(12)

No. 89-1895-CFX
Status: GRANTED

Title: Astoria Federal Savings and Loan Association, Petitioner
v.
Angelo J. Solimino

Docketed:
May 30, 1990

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Kaplan,Roger S.

Counsel for respondent: Flamm,Leonard N.

NOTE: See mail. label. dockt. dt.

Entry	Date	Note	Proceedings and Orders
1	May 30 1990	G	Petition for writ of certiorari filed.
2	Jun 11 1990		Waiver of right of respondent Angelo Solomino to respond filed.
3	Jun 12 1990		DISTRIBUTED. June 27, 1990
4	Jun 26 1990	F	Response requested -- AS.
5	Jul 23 1990		Brief of respondent Solimino in opposition filed.
6	Jul 25 1990		REDISTRIBUTED. September 24, 1990
7	Oct 1 1990	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Dec 3 1990		Brief amicus curiae of United States filed.
9	Dec 5 1990		REDISTRIBUTED. January 4, 1991
10	Jan 7 1991		Petition GRANTED.
			**********
12	Feb 20 1991		Brief amicus curiae of Atlantic Legal Foundation filed.
13	Feb 20 1991		Joint appendix filed.
14	Feb 20 1991		Brief of petitioner Astoria Federal Savings and Loan Assn.. filed.
11	Feb 21 1991		Brief amicus curiae of Equal Employment Advisory Council filed.
15	Feb 27 1991		SET FOR ARGUMENT WEDNESDAY, APRIL 17, 1991. (2ND CASE)
16	Mar 7 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Mar 13 1991		Record filed.
		*	Certified copy of C.A. Proceedings received.
18	Mar 18 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
19	Mar 22 1991		CIRCULATED.
21	Mar 22 1991	X	Brief of respondent Solimino filed.
20	Mar 25 1991	G	Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument pro hac vice filed.
22	Mar 25 1991	X	Brief amicus curiae of American Assn. of Retired Persons filed.
23	Mar 25 1991	X	Brief amicus curiae of United States filed.
24	Mar 25 1991	X	Brief amicus curiae of New York State Division of Human Rights filed.
25	Apr 1 1991		Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument pro hac vice GRANTED.

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No. 89-1895-CFX

Entry	Date	Note	Proceedings and Orders
26	Apr 17 1991		ARGUED.

89-1895
No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTORIA FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, under this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), preclusive effect should be given to a judicially unreviewed state agency finding of no probable cause so as to bar a subsequent action in federal court under the Age Discrimination In Employment Act of 1967.

LIST OF PARTIES

The parties to the proceedings below were Petitioner-Appellant, Astoria Federal Savings and Loan Association, and Respondent-Appellee, Angelo J. Solimino. Briefs *amicus curiae* were filed by the Equal Employment Opportunity Commission and the American Association of Retired Persons in the Second Circuit. Counsel for the Equal Employment Opportunity Commission presented oral argument to the Court of Appeals.

LISTING PURSUANT TO RULE 29.1

Astoria Federal Savings and Loan Association has no parent company but has the following wholly owned subsidiaries:

AF Equities Corp.
AF Staten Island Development Corp.
AF Roosevelt Avenue Corp.
AF Astoria Corp.
AF Woodside Corp.
AF Glen Cove Corp.
AF Cortland Corp.
AF Agency, Inc.

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REFERENCE TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at ___ F.2d ___,[1] and is reprinted in the Appendix beginning at (A.1).[2] The opinion of the United States District Court for the Eastern District of New York is reported at 715 F. Supp. 42, and is reported in the Appendix at (A.14).

STATEMENT OF GROUNDS OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit Court of Appeala on April 12, 1990.

This Court has jurisdiction of this petition pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Age Discrimination in Employment Act, 29 U.S.C. §§621-634 (the "ADEA") and the New York Human Rights Law, N.Y. Executive Law, §§290-301 (N.Y. McKinney's Consol. Laws 1982 & Supp. 1990). The pertinent sections of these statutes are reprinted in the Appendix at A.30-A.43.

PROCEEDINGS BELOW

Respondent, Angelo J. Solimino ("Solimino") was employed by Petitioner, ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION ("Astoria Federal") from October 4, 1945 until March 5, 1982, when, at age 63, he was terminated from his position as Vice-President of the Mortgage Origination Department. (A.3).

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[1] The Second Circuit's slip opinion is reproduced in the Appendix to this Petition; the official report was not available at the time this Petition was prepared.

[2] References preceded by an "A." are to page numbers of the Appendix to this Petition.

The Court of Appeals found that, on March 18, 1982, Solimino filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC referred the matter to the New York State Division of Human Rights pursuant to a worksharing agreement between the two agencies. Treating the case as a potential violation of both the ADEA and the State Human Rights Law, N.Y. Exec. L., §§ 290-301, which also bars age discrimination in employment, the New York State Division of Human Rights ("DHR") assigned the matter to a staff member for investigation. (A.3).[3]

The DHR human rights specialist who investigated the matter issued an Investigative Report on October 5, 1982 in which she summarized the positions of the parties and the evidence theretofore submitted, and on November 29, 1982, conducted a hearing. (A.3). The hearing was attended by both parties and their counsel. Witnesses presented by each party gave sworn testimony. (A.3). A transcript of approximately 80 pages resulted from the testimony of the five witnesses (including Respondent Solimino and the president of Astoria Federal) and the arguments of the parties' counsel.[4] Both sides had an opportunity to examine and cross-examine witnesses and present argument on behalf of their respective positions.

On January 25, 1983, the DHR dismissed the complaint, finding that no probable cause existed to believe that the alleged age discrimination had occurred. (A.3). The State Human Rights Appeal Board affirmed this determination on May 30, 1984, after

[3] The charge form which Solimino filed with the EEOC had the typed name of the "NYS Division of Human Rights" inserted just below the printed name of the Commission, and although it specifically alleged age discrimination, it did not cite either the ADEA or the State Human Rights Law as a basis for jurisdiction. Thus, it appears that the charge was intended to invoke the respective jurisdictions of both agencies. It also appears that the DHR's handling of the matter resulted in a consolidated, concurrent disposition of the case under federal and state law.

[4] The swearing of witnesses and the presence of a court stenographer were at the insistence of Solimino.

giving Solimino the opportunity to submit a brief and to present oral argument. (A.3-4).[5] The DHR's finding was never judicially reviewed. (A.4).[6]

As the Second Circuit also found, during the pendency of his appeal before Appeal Board, Solimino began an action on July 29, 1983 in State Supreme Court, New York County, against certain Astoria Federal officers and DHR employees and Astoria Federal's law firm for wrongful termination, prima facie tort, perjury and conspiracy. This action, however, did not explicitly seek judicial review of the DHR's findings as to Solimino's age discrimination claim. (A.4).[7] The Supreme Court dismissed the complaint against some of the defendants on April 16, 1984, and as to the remaining parties on May 10, 1984. The Appellate Division affirmed these dismissals a year later. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dept. 1985)(A.4).

[5] In dismissing the complaint and closing the file on January 25, the DHR had noted, "The Division and the Appeal Board are separate agencies."

[6] Under N.Y. Exec. L., §298, as it then read, Solimino had thirty days in which to seek judicial review in the Appellate Division of the New York State Supreme Court. L. 1951, c. 800. (The Appeal Board was subsequently abolished. L. 1985, c. 340 § 1. Under the same amendment, judicial review could be sought from an order of the DHR by instituting proceedings in the State Supreme Court (trial court) in the appropriate county. *Id.* § 298.)

In a formal Notice accompanying its Order, the Appeal Board advised Solimino of his right to seek judicial review, but noted:

> A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer v. Chemical Construction Company*, 456 U.S. 461 (1982).

There was no reference, however, as to the effect of state judicial review on a later suit in federal court under the ADEA. The Order of the State Human Rights Appeal Board is reprinted in the Appendix at A.44.

[7] Under New York law in effect in 1983, judicial review of a DHR "no cause" finding was available only in the Appellate Division, and then, only after the complainant had exhausted his remedies before the Appeal Board. Exec. L., § 298 (L.1951 c. 800).

On February 21, 1985, Solimino brought this action under the ADEA against Astoria Federal in the United States District Court for the Eastern District of New York, maintaining that Petitioner had unlawfully denied him promotions and raises and terminated him because of his age. (A.4). Astoria Federal moved for summary judgment on February 23, 1989, alleging, *inter alia*, that the DHR's prior judicially unreviewed finding that Solimino's treatment and termination did not result from age discrimination precluded Solimino's federal suit under the ADEA. (A.4).

The District Court granted Astoria Federal's motion on administrative estoppel grounds.[8] It agreed that the DHR hearing and determination, although unreviewed by the state courts, had a preclusive effect on Solimino's ADEA federal court action. (A.19). The District Court concluded that common-law rules of preclusion applied to the DHR proceedings and that nothing in the ADEA overcame the presumptively preclusive effect of the state agency findings. (A.27-A.28). The Court also rejected Solimino's argument that the state agency hearing failed to meet the requirements of due process, and found that the DHR findings bound the Court. (A.28-A.29).

The Court of Appeals reversed. Persuaded from its review of the ADEA "that Congress intended that a finding of no discrimination by a state agency which has not been judicially reviewed should have no preclusive effect in federal court" (A.6), it remanded the case for further proceedings. (A.13).[9]

This proceeding followed.[10]

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[8] It rejected that prong of Astoria Federal's motion based on statute of limitations grounds. (A.16-A.18). The statute of limitations issue was not raised in the Court of Appeals and is not sought to be reviewed here.

[9] Because of its decision, the Second Circuit did not reach the issue whether the state administrative proceedings in this case satisfied due process and should bind the District Court under principles of administrative estoppel.

[10] The Court of Appeals has stayed its mandate pending the filing of this petition.

REASON FOR GRANTING THE WRIT

THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER, UNDER THIS COURT'S DECISION IN *UNIVERSITY OF TENNESSEE V. ELLIOTT*, 478 U.S. 788 (1986), PRECLUSIVE EFFECT SHOULD BE GIVEN TO A JUDICIALLY UNREVIEWED STATE AGENCY FINDING OF NO PROBABLE CAUSE SO AS TO BAR A SUBSEQUENT ACTION IN FEDERAL COURT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

This Court should grant *certiorari* to resolve a conflict in the circuits as to whether judicially unreviewed state administration findings that a complainant was not unlawfully discriminated against on the basis of age should preclude a later federal court suit under the ADEA on the same complaint.

As the Second Circuit observed, this conflict has its genesis in this Court's 1986 decision addressing a similar preclusion issue under Title VII of the Civil Rights Act of 1964[11] and 42 U.S.C. §1983:

> In *University of Tennessee v. Elliott*, 478 U.S. 788, 795-96 (1986), the Supreme Court held with respect to suits under Title VII, which prohibits employment discrimination on the basis of race, color, sex, religion or national origin, that Congress intended to give no preclusive effect to judicially unreviewed findings of a state agency. In contrast, the Court held that Congress did intend to give preclusive effect to findings in suits under 42 U.S.C. §1983, which prohibits deprivation of civil rights by state officials acting under color of state law. *Id.* at 796-99. Since *Elliott*, two circuit courts have differed as to whether, in enacting the ADEA, Congress intended to give preclusive effect to

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[11] 42 U.S.C. §2000e, *et seq.* (1985)

findings of a state agency which have not been judicially reviewed. *See Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987)(finding for grievant on issue at bar); *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988)(*contra*)(one judge dissenting).

(A.5).[12]

A. The Courts Below Had To Choose Between Conflicting Interpretations And Results Over The Issue Of Preclusive Effect: The Split Between The Seventh Circuit (Duggan) and Eighth Circuit (Stillians).

The circuit courts in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) and *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988)(one judge dissenting), followed fundamentally different approaches in deciding the issue of administrative preclusion under the ADEA to reach opposite conclusions.

The Seventh Circuit, in *Duggan*, concluded that Title VII of the Civil Rights Act of 1964 and the ADEA should be construed

[12] In a footnote to the quoted passage, the Court of Appeals observed that the question had produced opposing results even in the district from which this case arose, comparing Judge Glasser's opinion in this case with the opinion of Judge Dearie in *Ibrahim v. New York State Department of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988)(citing *Duggan* and rejecting *Stillians*). *Id.* at A.5 n.1. The court also noted that "[o]ther courts have faced this question of Congressional intent without fully resolving it," citing *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283 (9th Cir. 1986) (preclusion permissible where agency acted in a judicial capacity and gave grievants an adequate opportunity to litigate, citing *Elliott*, but without discussing its applicability to the ADEA; case decided on grievant's lack of opportunity to litigate); *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646-47 (11th Cir. 1987)(preclusion inapplicable where grievants had inadequate opportunity to litigate their claims in the state agency, and stating in dictum that it was disinclined to believe Congress intended preclusion to apply);and *Frank v. Capital Cities Communications, Inc.*, 689 F. Supp. 334, 337-38 (S.D.N.Y. 1988)(declining to reach the issue of Congressional intent to give preclusive effect when grievant did not litigate the same issues and claims in state agency).

alike based on a comparison of their respective deferral mechanisms. Observing that the deferral mechanism of the ADEA was patterned after Title VII, and that both statutes provide state agencies with only a limited opportunity to resolve discrimination claims before a federal suit could be filed, the Court said "it is unlikely that Congress intended the process to effectively stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." 818 F.2d at 1295. The Court also said that if unreviewed state administration findings were given *res judicata* effect in a federal court action, the concurrent or subsequent EEOC investigation authorized by the statute would be superfluous, and it would be anomalous to give such state findings conclusive effect when the findings of the EEOC itself would not preclude *de novo* judicial review. *Id.* at 1295.

The Eighth Circuit in *Stillians*, however, explicitly rejected the *Duggan* approach of "reason[ing] by analogy" to Title VII as well as its refusal to give preclusive effect to judicially unreviewed state agency findings in federal court suits under the ADEA. 843 F.2d at 281. The *Stillians* Court favored a stand-alone examination of the ADEA which, in light of the common law presumption of preclusion discussed in *University of Tennessee v. Elliott*, 478 U.S. 788, 796-798 (1986), fully supported giving such preclusive effect. It noted, in particular, that this Court, in *Elliott*, relied on Title VII's unique requirement that the EEOC give "substantial weight" to the findings of state agencies, a directive that could not be reconciled with giving preclusive effect to those findings in Civil Rights Act cases. *Id.* at 281, *citing* 478 U.S. at 3224. Such language, if discussed, was missing from the ADEA. "Absent an affirmative showing of Congressional intent to derogate from the common law," it said, "ADEA claims may be precluded by prior unreviewed state administrative determinations." 843 F.2d at 281.[13]

[13] The Eighth Circuit also concluded that traditional rules of preclusion apply where the administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. *Id.* at 281 n.3.

The Second Circuit in the present case chose to follow *Duggan*.[14] In this, it was wrong. The reasoning of the Seventh and Second Circuits is flawed; sustaining it would cause uncertainty in the administration of the ADEA and waste of the resources of state and federal fair employment practice agencies. This Court should grant *certiorari* to decide that the *Stillians* approach is correct, and that, under the ADEA, federal courts may grant preclusive effect to unreviewed administrative decisions of state agencies in appropriate cases.

As we show next, this case provides a suitable vehicle for review since the District Court and the Court of Appeals, like the Seventh and Eighth Circuits, approached this case differently and reached conflicting conclusions.

B. The District Court Here Correctly Followed The *Stillians* Approach Based on Its Reading of *Elliott*.

In the present case, the District Court read *Elliott* as placing the burden on the plaintiff to show why administrative estoppel should not apply. "*Elliott* teaches," it said,

> that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to "contravene the common law rules of preclusion [.]" *Id.*, 478 U.S. at 797. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.
>
> That is precisely the way the Eighth Circuit read *Elliott* in its *Stillians* opinion.

(A.21). The District Court viewed *Stillians* as "hold[ing], in essence, that the presumption favoring retention of common-law

[14] The District Court relied on *Stillians* to hold that Solimino's ADEA suit was precluded by the DHR's "no-cause" finding. (A.27-A.28).

rules of preclusion had not been rebutted where the ADEA's language and legislative history gave no indication of Congress's intent regarding the preclusive effect of unreviewed state findings." (A.22).

The District Court rejected the approach followed in *Duggan*. It found that the Seventh Circuit's opinion depended upon the "debatable assumption" that the Supreme Court in *Elliott* "became so thoroughly distracted by 'the most obvious piece of evidence' favoring preclusion in ADEA cases — *i.e.*, the 'substantial weight' provision contained in [§ 706(b) of Title VII] §2000e-5(b)[15] that it failed to articulate the true basis of its decision — *i.e.*, the lack of deference implicit in the structure of Title VII's 'deferral mechanisms'." (A.26). The District Court refused to make such an assumption, stating that this Court was capable of articulating its reasoning and that its reasoning in *Elliott is* clearly articulated. (A.26).

The District Court also scored the *Duggan* opinion for improperly conflating the issues of preclusion and deference, which are different in effect and purpose. (A.26). Preclusion, the Court observed, gives the state agency the "last word," whereas deference merely gives it "first crack." *Id.* The proper inquiry under *Elliott* was not to compare the deferral mechanisms of the ADEA with Title VII, it said. Rather, the proper inquiry was whether or not any provision of the ADEA evinces a Congressional intent to contravene the common law rules of preclusion. (A.27). The Court found no provision disclosing such an intent. (A.27). It therefore granted summary judgment to Astoria Federal.

For reasons discussed below, the District Court's decision was correct. Not only did it reflect a proper respect for the allocation of state and federal, administrative and judicial responsibilities under the ADEA, but it demonstrated a fidelity to the

[15] 42 U.S.C. §2000e - 5(b). This provision states in material part:

> In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under state or local law pursuant to the requirements of subsections (c) and (d) of this action.

ADEA and willingness to use sound judicial presumptions to reach a sensible result.

C. The Court Of Appeals Here Erroneously Followed the *Duggan* Rationale to Find An Absence of Preclusive Effect.

Based on its analysis of certain provisions of the ADEA, the statute's legislative history, and relying heavily on *Duggan*, the Second Circuit inferred that, regardless of the outcome of judicially unreviewed plenary state administrative proceedings, aggrieved individuals could bring *de novo* suits in federal court under the ADEA. As we shall show, this decision was wrong. We consider the Court of Appeals' arguments *seriatum*.

1. *The statutory language arguments.*

First, the Court of Appeals cited section 14(b) of the ADEA,[16] which says that a plaintiff may not begin a federal court action "before the expiration of sixty days after proceedings have been commenced under the State law, *unless such proceedings have been earlier terminated.*" (A.6)(emphasis supplied by Second Circuit). The Court of Appeals reasoned that Congress would not have permitted the plaintiff to bring an ADEA suit after termination of state agency proceedings if it had intended administrative preclusion to apply. (A.6). It further noted that under the ADEA a person may file a complaint with both the EEOC and the state agency. Therefore, it said, state administrative preclusion would render the EEOC's concurrent investigative jurisdiction superfluous, a result which could not have been intended. (A.6-A.7).

Second, relying on the supersession clause of Section 14(a) of the ADEA,[17] the Court of Appeals determined that Congress must

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[16] 29 U.S.C. § 633(b) (1985)

[17] 29 U.S.C. § 633(a) provides, in material part:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to [age discrimination] except that upon commencement of action under this chapter such action *shall supersede any State action.*

(A.7). (emphasis supplied by Second Circuit.)

have included prior agency fact-finding within the ambit of superseded "state action" and that there would be little reason to "give a grievant a second bite at the apple" if a state administrative decision were intended to bar a federal court from an independent determination. (A.7-A.8).

Contrary to the implication of the Second Circuit's opinion, no provision of the ADEA, by its "plain meaning," *cf. Chandler v. Roudebush*, 425 U.S. 840, 848 (1976)(federal employee entitled to find *de novo* under Title VII), answers the question of preclusion in favor of Solimino. Sections 14(b) and 14(a) do not answer the question. Neither addresses the subject. Read literally, each section could justify a *de novo* federal court action following judicial confirmation of a state administrative finding. Even the Second Circuit recognized such an interpretation would run afoul of *Kremer*. (A.8). Yet, once an exception is made for such preclusion under 28 U.S.C. § 1738, nothing in the ADEA prevents an exception from also being made for common-law or administrative preclusion under *Elliott*. At most, these provisions justify the limited conclusion that "*initial resort* to state administrative proceedings does not deprive an individual of a right to a federal trial *de novo* on [an ADEA] claim." *Cf. Kremer*, 456 U.S. at 477 (construing prior decisions discussing the applicability of § 1738 to Title VII) (emphasis in original).

2. *The legislative history argument.*

Third, the Court of Appeals found that the legislative history clearly indicates that the ADEA was enacted because "some state age discrimination laws were ineffective or inadequately enforced." (A.8). Congress would not have given preclusive effect to state agency determinations in such circumstances, it inferred. (*Id.*).

The legislative history of the ADEA offers no significant support for the Second Circuit's conclusion. Indeed, the Seventh Circuit in *Duggan* recognized that "the ADEA's legislative history

does not help us decide which policies actually lie behind section 633(b)." 818 F.2d at 1296.[18] Inclusion of this clause may indicate that Congress believed "some state age discrimination laws were ineffective or inadequately enforced, before", but beside the point. (A.8). As stated in connection with Title II, "New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination." *Kremer*, 456 U.S. at 473 (citations omitted). This implies that Congress may have been just as content to *permit* preclusion through judicially unreviewed state administration determinations in appropriate cases as it was to disallow it.

3. *The statutory structure arguments.*

Fourth, the Court of Appeals reasoned that since the decisions of the EEOC do not preclude *de novo* fact-finding by the federal courts, Congress could not have intended unreviewed state agency decisions to preclude such fact-finding either. (A.8).

Fifth, the Second Circuit would not presume that Congress intended a grievant, who had no control over the EEOC's decision to refer his ADEA case to a state agency, should be bound by an adverse, judicially unreviewed decision of that agency. (A.10).

Sixth, the Court of Appeals cited a number of provisions in the ADEA which it construed as indicating a Congressional intent to allow an ADEA grievant even earlier and freer access to federal court than Congress has allowed Title VII grievants.

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[18] In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), however, this Court held that "The ADEA permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing of age-discrimination claims." 441 U.S. at 757. As the Seventh Circuit recognized, this rationale would not be inconsistent with federal court and EEOC deference "to findings made after a *completed* state agency investigation." *Duggan*, 818 F.2d at 1296. In the present case, the state agency investigation was finished before the ADEA lawsuit was begun in federal court by Solimino.

(A.10-A.11). Since Congress did not intend Title VII suits to be barred by the preclusive effect given to unreviewed state agency decisions, according to the Second Court, it could not have intended ADEA suits to be so obstructed either. (A.11-A.12).

These arguments are also answerable. The "anomaly" of holding judicially unreviewed state agency findings to be preclusive while denying such effect to EEOC proceedings is merely a consequence of the ADEA's "dual track method of procedure and the respective powers of the EEOC and the state agencies." *Cf. Yellow Freight System, Inc. v. Donnelly*, ___ U.S. ___, ___, 110 S.Ct. 1566, 1569 (1990). So, too, is the impact of the EEOC's procedure by which it routinely defers ADEA charges to state agencies, thus involuntarily (if temporarily) remitting complainants to state procedures. *Duggan*, 818 F.2d at 1296 n.11, *citing* 29 C.F.R. §1626.9 (1986). *See Oscar Mayer*, 441 U.S. at 764 n.11.

These are matters of Congressional will or sufferance, not judicial choice. If Congress does not like the consequences of its handiwork, it can change the law. *Stillians*, 843 F.2d at 280. That ADEA litigants may have "earlier and freer access to federal courts" than Title VII litigants, the Second Circuit's final thrust, argues as forcefully for making complainants like Solimino live with their decision to remain in the state administrative system after sixty days and be bound by its disposition, as it does for following the no-preclusion rule of Title VII. *Stillians*, 843 F.2d at 282. After all, the aggrieved persons could always seek judicial relief after the two-month state agency hiatus, assuming the DHR has not resolved the probable cause issue. State proceedings should be more than a rehearsal for a federal court action.

4. *The argument over the significance of Title VII's "substantial weight" provision.*

Finally, the Second Circuit disagreed with the District Court's reliance on the "substantial weight" provision of Title VII. "[A]s we read *Elliott*," it said, "there is no reason to think that the absence of the phrase 'substantial weight' from the ADEA disposes of the preclusion issue." (A.12) (footnote omitted). The

Court of Appeals considered the phrase "only one piece of evidence" cited by this Court in *Elliott*, pointing to its reliance there on *Chandler* (A.12). The Court of Appeals also observed that the "substantial weight" provision was added to Title VII in 1972 in order to increase rather than decrease the EEOC's deference to state agency findings. (A.12-A.13). Therefore, it concluded, its absence from the ADEA could not be read as authorizing a doctrine of preclusion based on unreviewed state agency findings. (A.13).

Chandler simply will not support the weight thrust upon it by the Second Circuit. There, the Court was dealing with a specific statutory provision, Section 717(c) of Title VII, whose "plain meaning," supported by recent legislative history played out "against [a] backdrop of focused debate," a "thorough and meticulous consideration" of and a "controversy centered" on the issue in question — the availability of *de novo* trials for aggrieved employees — should federal government workers also have this right. The clarity of statutory language and strong legislative history present in *Chandler* is absent here. This Court did not have to engage in an inferential exercise based on bits and pieces of statutory structure, as the Court of Appeals has attempted here.

Regardless of the reason the "substantial weight" provision was added to Title VII in 1972 or the proper interpretation of Title VII prior to its addition, it makes the present statutory meaning clear. That no such language was ever included in the ADEA is what is significant here.

"There is no overriding federal policy that discrimination claims be heard in federal court." *Stillians*, 843 F.2d at 282. This Court recently emphasized that very point. *Yellow Freight*, ____ U.S. at ____, 110 S.Ct. at 1570. Indeed, the Court suggested that, in a case such as this, Mr. Solimino might have filed his ADEA suit in state court. *See Id.* at ____, 110 S.Ct. at 1570 (dictum). That being so, it is reasonable to suppose that the decision in *Elliott* was based on "statutory and decisional law unique to Title VII," and not on any general policy favoring federal court participation. *Stillians*, 843 F.2d at 282.

Thus, the reasoning of the Seventh Circuit in *Duggan* and the Second Circuit here is flawed as applied to ADEA claims. It should be rejected in favor of the rationale of *Stillians* and the District Court in this case. Review should be granted to determine the issue of administrative preclusion under the ADEA, and resolve the conflict between the Circuits.

D. The Conflict In The Circuits Exemplified By This Case Should Be Resolved In Favor of Fairness To Litigants And Furtherance Of The Efficient Administration Of Justice.

The conflict between the circuits as to whether judicially unreviewed state agency findings should preclude federal court actions under the ADEA causes much uncertainty in the administration of that statute and in defining the respective roles of the state and federal enforcement agencies and courts. The rights of parties in employment-related age discrimination cases ought not to be left to guesswork by them and second guessing by the courts. If a state agency determination, which has not been reviewed by a state court, can preclude a federal court ADEA suit, then that election of forum and remedies should be clear. If a grievant knew preclusive effect would be given to a state administrative decision, then on the sixty-first day after the state agency received a case from the EEOC, which was still open, a grievant would also know that he or she could choose whether to file suit in district court. The answer to the question of preclusion should be consistent for all ADEA litigants and should not depend on the circuit in which the complainant and respondent happen to be found.

The choice between *Duggan* and *Stillians* is a close one. On the whole, however, the better of the arguments seems to lie with *Stillians*. In the absence of specific statutory authorization, *de novo* review is generally not to be presumed. *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 619 n. 17 (1966). Furthermore, except where there is an "affirmative showing" of a "clear and manifest legislative purpose" in the ADEA to the contrary, *cf. Kremer*, 456 U.S. at 485 (involving the applicability of 28 U.S.C. §1738 to Title VII), the common law rule of preclusion requires that when a state agency acting in a judicial capacity resolves

disputes before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same effect to which it would be entitled in the State's courts. *Elliott*, 478 U.S. at 799. No such showing is present here. "That expectation [by the drafters], even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption. . . ." *Cf. Yellow Freight*, ____ U.S. at ____, 110 S.Ct. at 1569 (presumption of State court jurisdiction to hear Title VII cases).

E. The State Administrative Finding Of "No Probable Cause" Satisfies Due Process Requirements For Preclusive Effect.

The District Court rejected Solimino's argument that the proceeding accorded him before the state agency level failed to meet constitutional due process requirements, thus preventing the Court from giving the state determination preclusive effect. (A.28). It correctly found that the elements of administrative estoppel outlined in *Elliott*, 478 U.S. at 797-98, all were present. (A.28-A.29). Thus, the DHR was acting in a judicial capacity, the disputed issues of fact were properly before the agency and the parties were given an adequate opportunity to litigate them.

Moreover, the courts of New York would give the DHR fact-finding determination preclusive effect. (A.28-A.29). Since the ultimate finding of the DHR was adverse to Solimino[9] and the District Court considered itself bound by this finding, it granted summary judgment to Astoria Federal. (A.29). The Court of Appeals did not address this issue, but evidently assumed, for purposes of decision, that the no cause determination represented "judicially unreviewed DHR findings" that "Solimino's treatment and termination were not due to age discrimination . . . ." (A.4, A.13).

The Determination issued by the DHR, by its express terms as well as a matter of law, meant that the evidence submitted

[9] The Division of Human Rights found that "[t]he record as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age" and that "[t]here is no evidence in the file that complainant's age was a factor in his termination." (A.29).

by Mr. Solimino failed to reveal any merit to his complaint of age discrimination. *See Kremer*, 456 U.S. at 480-81. n.21, 483-85. The procedures afforded Mr. Solimino to present his case were certainly sufficient under the Due Process clause. He was granted a fact-finding hearing before the DHR investigator, where testimony was presented by witnesses for both sides. At Mr. Solimino's request, evidence was given under oath and with a court reporter present. A stenographic transcript was made. Both sides were represented by counsel and had the opportunity to cross-examine. (A.28). Written proofs were submitted earlier in the investigation. The Complainant also availed himself of an appeal to the Human Rights Appeal Board, which affirmed the DHR's Determination after briefing and oral argument by Respondent. (A.3-A.4). This was certainly ample due process under *Kremer*. *Id.* at 483-85 and n.26. The New York courts would give preclusive effect to the findings based on such a hearing. (A.28-A.29).

The petition should be granted to resolve the conflict presented here over the substantial issue of access to the judicial process after the claimant's previous failure at the state agency.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
May 30, 1990

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 441—August Term, 1989

Argued: November 16, 1989 Decided: April 12, 1990

Docket No. 89-7639

ANGELO J. SOLIMINO,

Plaintiff-Appellant,

—v.—

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant-Appellee.

Before:

LUMBARD, FEINBERG, and MESKILL,

Circuit Judges.

Angelo J. Solimino appeals from a summary judgment of the District Court for the Eastern District of New York, Glasser, *J.*, which dismissed his complaint against Astoria Federal Savings and Loan Association under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, on the ground that a prior

judicially unreviewed finding of no discrimination by a state agency precluded Solimino's suit.

Reversed and remanded.

LEONARD N. FLAMM, New York, New York (Hockert & Flamm, New York, New York, Joseph J. Gentile, Long Island City, New York, of counsel), *for Plaintiff-Appellant*.

ANTHONY H. ATLAS, New York, New York (Paul J. Siegel, Sara J. Herrin, Roger S. Kaplan, Jackson, Lewis, Schnitzler & Krupman, New York, New York, of counsel), *for Defendant-Appellee*.

LAMONT N. WHITE, Attorney, United States Equal Employment Opportunity Commission, Washington, DC (Charles A. Shanor, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent Blackwood, Assistant General Counsel, Washington, DC, of counsel), *for amicus curiae United States Equal Employment Opportunity Commission*.

ROBERT L. LIEBROSS, Washington, DC (Steven S. Zaleznick, Cathy Ventrell-Monsees, Washington, DC, of counsel), filed a brief *for amicus curiae American Association of Retired Persons*.

LUMBARD, *Circuit Judge*:

Angelo J. Solimino appeals from a summary judgment of the District Court for the Eastern District of New York, Glasser, *J.*, which dismissed his complaint against Astoria Federal Savings and Loan Association under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"). The district court held that Solimino was estopped from proving his case by a judicially unreviewed finding of no discrimination made by the New York State Division of Human Rights ("DHR"). Because Congress intended that federal courts give no preclusive effect in ADEA suits to the judicially unreviewed fact-finding of a state agency, we reverse.

Solimino was employed by Astoria from October 4, 1945 until March 5, 1982, when, at age 63, Astoria terminated his employment as vice-president of the Mortgage Origination Department.

On March 18, 1982, Solimino filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC referred the matter to the DHR pursuant to a worksharing agreement between the two agencies. Treating the case as a potential violation of both the ADEA and New York State Human Rights Law, the DHR assigned it to a human rights specialist, who issued an investigative report on October 5, 1982 and on November 29, 1982 conducted a hearing, attended by all parties and counsel, at which the witnesses of each party gave sworn testimony. On January 25, 1983, the DHR dismissed the complaint, finding that no probable cause existed to believe that the alleged discrimination had occurred. The State Human

Rights Appeal Board affirmed on May 30, 1984, after giving Solimino the opportunity to submit a brief and to present oral argument. No court ever reviewed the DHR's findings.

While the administrative appeal was pending, Solimino commenced an action on July 29, 1983 in New York State Supreme Court, New York County, against certain Astoria and DHR employees and Astoria's law firm for ..rongful termination, prima facie tort, perjury and conspiracy. This suit did not seek judicial review of the DHR's findings as to Solimino's age discrimination claim. The court dismissed the complaint against some defendants on April 16, 1984 and as to the remaining defendants on May 10, 1984. The Appellate Division affirmed. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dep't 1985).

On February 21, 1985, Solimino commenced this action against Astoria, alleging that, because of his age, Astoria denied him promotions and raises and terminated his employment in violation of the ADEA. On February 23, 1989, Astoria moved for summary judgment on the grounds that the suit was barred by the statute of limitations and that the DHR's prior unreviewed finding that Solimino's treatment and termination were not due to age discrimination precluded Solimino's federal suit.

In a Memorandum and Order dated May 31, 1989, Judge Glasser granted Astoria's motion on the administrative estoppel ground while denying it on the statute of limitations ground. He held that Congress intended preclusion in federal ADEA suits and that the DHR's finding of no age discrimination was sufficient under the due process clause of the fourteenth amendment to justify preclusion of Solimino's federal suit. *Angelo J. Solimino v. Astoria Federal Savings and Loan Association*, 715 F. Supp. 42, 51 (E.D.N.Y. 1989). Solimino appeals. The EEOC, which administers the ADEA, has filed a brief *amicus* supporting Solimino's appeal.

In *University of Tennessee v. Elliott*, 478 U.S. 788, 795-96 (1986), the Supreme Court held, with respect to suits under Title VII, which prohibits employment discrimination on the basis of race, color, sex, religion or national origin, that Congress intended to give no preclusive effect to judicially unreviewed findings of a state agency. In contrast, the Court held that Congress did intend to give preclusive effect to such findings in suits under 42 U.S.C. § 1983, which prohibits deprivation of civil rights by state officials acting under color of state law. *Id.* at 796-99. Since *Elliott*, two circuit courts have differed as to whether, in enacting the ADEA, Congress intended to give preclusive effect to findings of a state agency which have not been judicially reviewed. *See Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) (finding for grievant on issue at bar); *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988) (*contra*) (one judge dissenting).[1]

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1 There is a conflict of opinion within the Eastern District. Before Judge Glasser in this case held that Congress intended preclusion, Judge Dearie held the opposite in *Ibrahim v. New York State Department of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988) (citing *Duggans* and rejecting *Stillians*).

Other courts have faced this question of congressional intent without fully resolving it. In *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283 (9th Cir. 1986), the Ninth Circuit held preclusion permissible if the agency acted in a judicial capacity and gave grievants an adequate opportunity to litigate; the court ignored the issue of Congressional intent, although citing *Elliott*, and ultimately ruled that the grievants did not have an adequate opportunity to litigate. In *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646-47 (11th Cir. 1987), the

We are persuaded from our review of the ADEA that Congress intended that a finding of no discrimination by a state agency which has not been judicially reviewed should have no preclusive effect in federal court.

First, Section 14(b) of the ADEA, 29 U.S.C. § 633(b), provides that, when alleged age discrimination occurs in a state which has an age discrimination law, the plaintiff may not sue under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, *unless such proceedings have been earlier terminated*" (emphasis added). The natural reading of the emphasized clause is that, if the state proceedings have been earlier terminated, the plaintiff may bring suit in federal court—assuming there has been no state court review of the agency findings—before the sixty-day period ends. We therefore think that Congress would not have allowed plaintiffs to bring suit under the ADEA following termination of state administrative proceedings if it had intended a judicially unreviewed fact-finding in such proceedings to have preclusive effect in the federal suit. Furthermore, under the ADEA, a person may file a complaint with both a state agency and the EEOC, and in such a situation, both agencies undertake their own inquiry. *See* 29 U.S.C. §§ 626(d) and 633(b). If Congress had intended preclusion from judicially unreviewed state agency findings, "the concurrent or subsequent EEOC investigation would be superfluous." *Duggan*, 818 F.2d at 1295.

Eleventh Circuit held that preclusion would not apply because the grievants did not have an adequate opportunity to litigate their claims in the state agency and stated in dictum that it was disinclined to believe Congress ever intended preclusion in federal ADEA suits. *See also Frank v. Capital Cities Communications, Inc.*, 689 F. Supp. 334, 337-38 (S.D.N.Y. 1988) (declining to reach issue of Congressional intent to give preclusive effect when grievant did not litigate same issues and claims in state agency).

Second, Section 14(a) of the ADEA, 29 U.S.C. § 633(a), provides:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to [age discrimination] except that upon commencement of action under this chapter such action *shall supersede any State action*.

(Emphasis added.) Congress clearly required that "any" state action, which necessarily includes prior agency fact-finding, be superseded for the purposes of the federal suit by federal proceedings and federal fact-finding.[2] Indeed, Congress enacted the sixty-day deferral mechanism "to give state agencies a limited opportunity to resolve problems of employment discrimination," *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (ADEA grievant may not sue in federal court until he commences state agency proceedings, but the dismissal of the complaint as untimely by the agency does not preclude federal suit), and "to screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings," *id.* at 756 (emphasis added). There would be little

2 In *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1049 n.7 (2d Cir. 1982), we determined that the automatic supersedure provision "stayed" state age-discrimination proceedings in the sense that it neither extinguished state claims nor cancelled state proceedings. There, grievants sought to continue pursuing their age discrimination claims in a state agency after federal proceedings terminated with a court-approved stipulation between the Secretary of Labor, who then enforced the ADEA, and the employer Pan American. The grievants were not satisfied with the stipulation obtained by the Secretary on their behalf. We did not have occasion to consider whether state agency findings should have preclusive effect in the federal suit.

reason to give a grievant a second bite at the apple if prior judicially unreviewed fact-finding, adverse to the grievant, were intended to bar a federal court from an independent determination of the matter.

Third, the legislative history clearly indicates that Congress enacted the ADEA because some state age discrimination laws were ineffective or inadequately enforced. *See* 113 Cong. Rec. 31254 (1967) (remarks of Sen. Javits); *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, at 10, *reprinted in* Legislative History of the Age Discrimination in Employment Act of 1967, U.S. Equal Opportunity Employment Commission, at 27. Given this articulated dissatisfaction with some state remedies to redress age discrimination, we believe that Congress intended the federal courts to give no preclusive effect to the judicially unreviewed fact-finding of a state administrative agency.

Fourth, in Title VII cases, the Supreme Court has stated that decisions of the EEOC do not preclude *de novo* fact-finding by a federal court and that Congress could not have intended the federal courts to be bound by the fact-finding of state administrative agencies when they are not bound by findings of the EEOC. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 n.7 (1982) (Full Faith and Credit Statute bars federal courts from relitigating state agency's finding, affirmed by state court, of no discrimination under Title VII). As the Seventh Circuit stated, "It would . . . be anomalous to conclude that unreviewed state administrative determinations must be given preclusive effect by federal courts when the findings of the EEOC itself do not preclude *de novo* judicial review." *Duggan*, 818 F.2d at 1295 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (recognizing private employee's right to trial *de novo* under Title VII, whether EEOC finds no discrimination or fails to make any finding whatever)). *See also Alexander v. Gardner-Denver*, 415 U.S. 36, 44-45 (1974) ("Courts retain [their] broad remedial powers [under Title VII] despite a[n EEOC] finding of no reasonable cause to believe that the Act has been violated.") (citing *McDonnell Douglas*). Moreover, according to the Supreme Court, "it is clear that unreviewed administrative determinations by state agencies . . . should not preclude [*de novo* federal court] review even if such a decision were to be afforded preclusive effect in a State's own courts." *Kremer*, 456 U.S. at 470 n.7 (citing, *inter alia*, *Voutsis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972)).

These principles, developed in Title VII cases, apply as well to ADEA cases. We recently recognized this in *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989):

> Our interpretations of the ADEA rely heavily on decisions arising under Title VII . . . "for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.' " *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 [] (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 [] (1978)).

Astoria asserts, however, that the procedural and remedial provisions of the ADEA derive from the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19, rather than from Title VII, *see Lorillard*, 434 U.S. at 584-85,

and that preclusion is either a procedural or a remedial issue. We are not persuaded. Some of the ADEA's procedures most relevant to this case were not adapted from the FLSA. The ADEA's deferral mechanism, obviously procedural, comes from Title VII, not from the FLSA. *Oscar Mayer*, 441 U.S. at 755. The ADEA's provision for automatic superseding of state agency action, also obviously procedural, derives from neither Title VII, *id.* at 757, nor the FLSA. In any event, assuming *arguendo* that we should look to the FLSA instead of Title VII for guidance as to the preclusion issue in this ADEA suit, Astoria fails to cite any part of the FLSA or its interpretive caselaw that indicates Congress intended in the FLSA to give preclusive effect to the judicially unreviewed fact-finding of a state administrative agency.[3]

Fifth, we do not believe that Congress could have intended that a grievant who is obligated to file a complaint with the EEOC in order to preserve his right to sue under the ADEA, 29 U.S.C. § 626(d), and who has no control over the EEOC's decision to refer the case to the state agency should be bound by an adverse, judicially unreviewed decision of that agency without having had a chance to make his case in federal court.

Sixth, the ADEA contains numerous provisions indicating a congressional intent to allow ADEA grievants earlier and freer access to federal court than Congress

3 Such caselaw may not exist because the FLSA does not mandate recourse to state agencies. *See Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221, 1227 (3d Cir. 1978) (in banc); *see also Marshall v. Chamberlain Mfg. Corp.*, 601 F.2d 100 (3d Cir. 1979). *Cf.* 29 U.S.C. § 211(b) (authorizing cooperation with state authorities).

has allowed Title VII grievants.[4] For example, the ADEA requires a grievant to wait only 60 days at most after the commencement of state proceedings before filing suit in federal court. 29 U.S.C. § 633(b). By contrast, Title VII requires the grievant to wait up to 60 days after commencing state proceedings before filing a charge with the EEOC, 42 U.S.C. § 2000e-5(c); *Duggan*, 818 F.2d at 1295, and thereafter to wait up to 180 days before commencing suit in federal court, 42 U.S.C. § 2000e-5(f)(1).[5] In addition, the ADEA does not give the state agency exclusive jurisdiction. *Oscar Mayer*, 441 U.S. at 757; *Duggan*, 818 F.2d at 1296. By contrast, Title VII gives the state agency an initial period of exclusive jurisdiction. 42 U.S.C. § 2000e-5(c). Since Congress clearly intended ADEA grievants to have earlier and freer access to federal court,[6] and since Congress did not intend Title VII suits to be precluded by prior agency fact-finding, we conclude that Congress intended that prior agency fact-finding which has not

4 The ADEA is more grievant-protective in other areas. The ADEA provides for liquidated damages that are punitive in nature, *Trans-World Airlines, Inc. v. Thurston*, *supra*, while Title VII does not, *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2375 n.4 (1989); *see also Great American Federal Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 392 (1979) (White, J., dissenting). The ADEA also provides for jury trial. *Lorillard*. Title VII does not. *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981). *See also Patterson*, 109 S. Ct. at 2391 (Brennan, J., dissenting). The ADEA is also more grievant-protective than is the FLSA. *See Dunlop*, 672 F.2d at 1053 n.10.

5 The grievant need not wait the full 60 days if the state proceedings are earlier terminated. 42 U.S.C. § 2000e-5(c). Nor need the grievant wait the full 180 days if the EEOC dismisses the charge before the 180-day period is over. 42 U.S.C. § 2000e-5(f)(1).

6 *See also Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America*, 772 F.2d 348, 351 (7th Cir. 1985) ("The policy of deference to state authority . . . is weaker [in the ADEA] than in Title VII . . . ."), and *Delgado*, 815 F.2d at 646 (citing *Martinez*).

been judicially reviewed should not be accorded preclusive effect in ADEA suits. *See Duggan*, 818 F.2d at 1296-97.

These considerations are given added weight by the opinion of the EEOC expressed in its *amicus* brief. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Duggan*, 818 F.2d at 1296.

The district court read *Elliott* to require preclusion in this case because the ADEA does not instruct the EEOC to give "substantial weight" to prior state agency decisions. According to the district court, the background rule, operative in the absence of the "substantial weight" provision, is that preclusion applies. However, as we read *Elliott*, there is no reason to think that the absence of the phrase "substantial weight" from the ADEA disposes of the preclusion issue.[7] In holding that judicially unreviewed state agency fact-finding could not preclude a Title VII suit in federal court, the *Elliott* Court mentioned the "substantial weight" provision as only one piece of evidence concerning congressional intent. Far from resting its conclusion on the phrase "substantial weight," the Court in *Elliott* also grounded its decision on *Chandler v. Roudebush*, 425 U.S. 840 (1976) (under Title VII, federal employees have same right to *de novo* federal trial following federal agency's finding of no discrimination as do private employees).

The "substantial weight" provision was added in the 1972 amendments to Title VII in order to increase, not decrease, the EEOC's deference to state agency fact-

7 Although the presence of the provision is dispositive because logically incompatible with preclusion, other considerations may also justify the conclusion that Congress intended no preclusion, as our discussion above indicates.

finding. *Kremer*, 456 U.S. at 474-75 and n.16.[8] "Prior to the 1972 amendments, the EEOC was free to ignore state administrative decisions." *Id.*; *see also id.* at 470-71 n.8.[9] In other words, the background rule with respect to the ADEA, operative in the absence of the "substantial weight" provision, is that preclusion does *not* apply. Since the words "substantial weight" do not appear in the ADEA, the logical conclusion is that the EEOC and, by extension, the federal courts are still free to ignore judicially unreviewed findings of no age discrimination made by state agencies. Thus, the judicially unreviewed DHR findings should have no preclusive effect whatever in Solimino's federal suit.

Reversed and remanded for further proceedings.

8 The Seventh Circuit relied on this piece of legislative history in *Duggan*, 818 F.2d at 1297. The district court found it of little value, and the Eighth Circuit in *Stilliano* ignored it.

9 "Congress is presumed to be aware of an administrative . . . interpretation of a statute *and to adopt that interpretation* when it re-enacts a statute without change . . . ." *Lorillard*, 434 U.S. at 580-81 (citations omitted) (emphasis added). In 1986, Congress amended numerous provisions of the ADEA but did not alter § 14, 29 U.S.C § 633. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342. Prior to the 1986 amendments, the EEOC interpreted § 14 as it does today, giving substantial weight, at most, but not preclusive effect to unreviewed state agency findings. *See EEOC's Compliance Manual* (CCH) ¶ 285, § 5.5(a)(2) (May 1985), *cited in Duggan*, 818 F.2d at 1296 n.12. Thus, Congress' actions have been consistent with the EEOC's view.

Angelo J. SOLIMINO, Plaintiff,

v.

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant.

No. 85 Civ. 0555.

United States District Court, E.D. New York.

May 31, 1989.

Bank employee brought action against employer alleging Age Discrimination in Employment Act violation. Defendant moved for summary judgment on ground action was time barred and plaintiff was administratively estopped from proving his case. The District Court, Glasser, J., held that New York State Division of Human Rights' decision denying bank employee's age discrimination claim had preclusive effect in federal court action alleging violation of Age Discrimination Act, even though state administrative decision was not reviewed by state court.

Motion for summary judgment granted.

Joseph J. Gentile, Long Island City, N.Y., for plaintiff.

Michael S. Cecere, Jackson, Lewis, Schnitzler & Krupman, New York City, for defendant.

MEMORANDUM AND ORDER

GLASSER, District Judge:

In this action brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, defendant moves pursuant to Fed.R.Civ.P. 56(b) for summary judgment on the grounds that (1) the action is time-barred, and (2) plaintiff is administratively estopped from proving his case. For the reasons stated below, the court grants defendant's motion on the latter ground.

FACTS

Plaintiff joined defendant Astoria Federal Savings & Loan as a teller in October 4, 1945. On March 5, 1982, he was terminated. By that time, he was 63 years old and had reached the position of Vice President of the Mortgage Origination Department.

Plaintiff filed a formal charge of age discrimination with the federal Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights (DHR) on March 18, 1982. DHR held an investigative hearing on November 29, 1982. DHR dismissed the complaint on January 25, 1983, and the State Human Rights Appeal Board affirmed on May 30, 1984.

On July 29, 1983, prior to the Appeal Board's affirmance, plaintiff brought an action in New York State Supreme Court for New York County, naming as defendants several officers and employees of the defendant, the defendant's law firm, and two employees of the DHR. Justice Dontzin construed the complaint as alleging causes of action for wrongful termination of employment, prima facie tort, perjury and conspiracy, and dismissed the entire complaint as against the non-DHR defendants, pursuant to N.Y. Civ.Prac.L. & R. § 3211(a)(7), for failure to state a cause of action. *Solimino v. Drewitz*, No. 22074/83 (Sup. Ct.N.Y.Co. April 16, 1984). Subsequently, Justice Myers dismissed the complaint as against the DHR defendants pursuant to N.Y.Civ.Prac.L. & R. § 3211(a)(7) for failure to state a cause of action. *Solimino v. Drewitz*, No. 22074/83 (Sup.Ct.N.Y.Co. May 10, 1984). The Appellate Division affirmed both rulings. *Solimino v. Drewitz*, 111 A.D.2d 602, 489 N.Y.S.2d 439 (1st Dep't 1985).

On February 21, 1985, plaintiff filed this action, alleging that defendant had begun to discriminate against him on the basis of age after he turned 56 by denying him salary increases and promotions and by promoting younger people over him, and that defendant had terminated him because of his age.

DISCUSSION

I. STATUTE OF LIMITATIONS

The ADEA's statute of limitations, 29 U.S.C. § 626(e)(1), incorporates by reference the statute of limitations contained in 29 U.S.C. § 255(a), which states in relevant part that an action is

> forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

For the purposes of this motion only, defendant concedes the applicability of the three-year limitations period based on a "willful violation" of the ADEA.

[1] Plaintiff claims that his cause of action accrued on the date he was terminated, March 5, 1982, so that his filing of the complaint on February 21, 1985 was timely. However, the case law uniformly rejects this contention. Rather, plaintiff's cause of action accrued on the date he was notified of his impending termination. *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 42 (2d Cir.1988); *Shockley v. Vermont State Colleges*, 793 F.2d 478, 481 (2d Cir.1986); *Miller v. International Telephone & Telegraph Corp.*, 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851, 106 S.Ct. 148, 88 L.Ed.2d 122 (1985); *Pfister v. Allied Corp.*, 539 F.Supp. 224 (S.D.N.Y. 1982); *E.E.O.C. v. Kimberly-Clark Corp.*, 531 F.Supp. 58 (N.D.Ga.1981).[1]

The parties agree that plaintiff was notified of his impending termination in a meeting with defendant's president, Henry Drewitz, which occurred sometime soon after a meeting of defendant's board of directors held on Wednesday, February 17, 1982.[2]

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[1] The basis for the decisions cited on this point is to be found in two Supreme Court rulings: *Delaware State College v. Ricks*, 449 U.S. 250, 258-59, 101 S.Ct. 498, 504-05, 66 L.Ed.2d 431 (1980) (limitations period in suit under § 1981 and Title VII ran from date tenure decision was made and plaintiff was notified) and *Chardon v. Fernandez*, 454 U.S. 6, 7, 102 S.Ct. 28, 28, 70 L.Ed.2d 6 (1981) (per curiam) (limitations period in § 1983 suit ran from date plaintiffs received termination letters).

[2] The date of the board meeting is undisputed. The minutes of the board meeting, dated 2/17/82, are annexed as Exhibit A to Affidavit of Plaintiff Angelo J. Solimino, In Opposition to Motion for Summary Judgment.

However, a factual dispute exists over whether plaintiff's meeting with Drewitz occurred on the Thursday or Friday after the board meeting (February 18 or 19, 1982), in which case the action is time-barred, or on the following Monday (February 22, 1982), in which case the action is timely-filed.

Defendant relies principally upon the Charge of Discrimination form which plaintiff filed with the EEOC and the New York State Division of Human Rights on March 18, 1982—no more than a month after the meeting with Drewitz. On that form, plaintiff put down February 18, 1982 as the "date most recent or continuing discrimination took place." Below that line of the form, in the narrative portion, plaintiff stated "I have been given a notice of termination on February 18, 1982[.]" The form was signed under penalty of perjury.

During the investigatory hearing before the State Division of Human Rights on November 29, 1982—over nine months after the Drewitz meeting—Drewitz testified that the meeting occurred on February 19, 1982. Tr.27-28. Solimino's testimony conflicted in several respects with Drewitz's, but did not contradict Drewitz's recollection regarding the date. *Id.*, 29-30. However, Solimino later referred to a meeting with Drewitz—apparently the same meeting—as having occurred on a Monday afternoon. Tr.66.[3] The first Monday after the February 17, 1982 board meeting was February 22, 1982. If that date or any date thereafter were correct, the action would be timely-filed.

Unlike the foregoing evidence, the rest of plaintiff's evidence on the statute of limitations issue dates from a time after this suit was filed, so that plaintiff's statements may reflect an awareness that his entire lawsuit was in danger of being dismissed as untimely.

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[3] While Mr. Solimino's prior consistent statement might be inadmissible hearsay, the hearing transcript in which it appears was attached to *defendant's* moving papers, and defendant sought no evidentiary ruling on its admissibility. Consequently, it is not error for the court to consider it on motion for summary judgment. *In re Teltronics Services*, 762 F.2d 185, 192 (2d Cir.1985) (party opposing summary judgment waived objections to affidavits not made on personal knowledge by not motioning the district court to strike them); *Walker v. Wayne County, Iowa*, 850 F.2d 433, 435 (8th Cir.1988), *cert. denied*, ____U.S.____, 109 S.Ct. 791, 102 L.Ed.2d 783 (1989) (same with respect to affidavits containing hearsay); *Williamson v. United States Department of Agriculture*, 815 F.2d 368, 383 (5th Cir.1987) (same).

At his December 1, 1988 deposition in connection with this lawsuit, Solimino steadfastly maintained that the meeting with Drewitz occurred on Monday, February 22, 1982 (Solimino Dep. 112, 117), although he also affirmed that every statement made on his Charge of Discrimination form was correct. Solimino Dep. 85-86.[4]

Finally, in connection with this motion, plaintiff has submitted his own affidavit and that of his wife. The affidavits allege that the meeting with Drewitz occurred on Monday, February 22, 1982.

[2] In considering this motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Insurance Co.*, 804 F.2d 9, 11 (2d Cir.1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d. 762 (1987) (citations omitted). Summary judgment is inappropriate where, as here, a factual dispute exists as to the accrual date of a cause of action, and resolution of that dispute will determine whether or not the action is time-barred. *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F.Supp. 832, 844 (S.D.N.Y.1988). *See also Helm v. South African Airways*, No. 84 Civ. 5404, 1987 WL 13195 (S.D.N.Y. June 25, 1987) (1987 U.S.Dist. LEXIS 5671) (in action under ADEA, fact dispute over date action accrued precluded summary judgment on statute of limitations grounds); *Hawley v. L.B. Smith, Inc.*, No. 82 Civ. 6372-CSH, 1985 WL 334 (S.D.N.Y. Feb. 25, 1985) (LEXIS, Genfed library, Dist. file) (same); *United States v. Becker*, No. 86 Civ. 3946, 1989 WL 34048 (S.D.N.Y. April 4, 1989) (1989 U.S. Dist. LEXIS 3227) (fact dispute over date on which tax assessment was made precluded summary judgment on statute of limitations grounds).

Accordingly, this ground for defendant's motion is rejected.

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[4] The court rejects defendant's contention that plaintiff's deposition testimony at 117-18 is an admission that the February 18, 1982 notice of termination date on the Charge is correct. Clearly, plaintiff merely voiced approval of the March 18, 1982 date stamped on the face of the Charge, indicating when it was received.

II. ADMINISTRATIVE ESTOPPEL

[3] Defendant argues that the unreviewed[5] decision of the New York State Division of Human Rights ("DHR") denying plaintiff's age discrimination claim has preclusive effect in this federal court action. Plaintiff disputes this, and argues alternatively that even if this were true, the DHR hearing did not meet constitutional standards of due process and therefore provides no basis for administrative estoppel.

The court agrees that the DHR hearing, although unreviewed by the state courts, has preclusive effect in this federal court action.

No Supreme Court or Second Circuit opinion deals with the question whether a state agency's unreviewed rejection of an age discrimination claim has preclusive effect in a subsequent federal court action brought under the ADEA. However, two Courts of Appeal have dealt expansively with the issue, reaching opposite conclusions. *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir.1987) (unreviewed agency decision not preclusive); *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir.1988) (unreviewed agency decision preclusive).[6]

The conflicting rulings in *Stillians* and *Duggan* reflect divergent interpretations of the Supreme Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). *Elliott* held that an unreviewed state agency determination was not binding on a federal court with respect to a Title VII claim, but was binding with respect to a claim under 42 U.S.C. § 1983.

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[5] The court does not view plaintiff's state court action as having sought or obtained judicial review of DHR's findings as to his age discrimination claim. *See* "FACTS," *supra*.

[6] Other opinions dealing with this issue do so only in *dicta*, or contribute little to the analyses contained in *Duggan* and *Stillians*. The Ninth Circuit found administrative estoppel unavailable on the facts of the case before it in *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282-84 (9th Cir.1986), but apparently assumed, without analysis, that unreviewed state agency findings could be preclusive in a federal ADEA suit. The Eleventh Circuit found administrative estoppel unavailable on the facts of the case before it in *Delgado v. Lockheed Georgia Co.*, 815 F.2d 641, 646 (11th Cir.1987), but expressed

(Footnote continued)

As to the Title VII claim, the Court's holding turned on a Title VII provision, 42 U.S.C. § 2000e-5(b), requiring the EEOC to give "substantial weight" to prior state proceedings. The Court noted that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." *Id.*, 478 U.S. at 795, 106 S.Ct. at 3225 (citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 n. 7, 102 S.Ct. 1883, 1891 n. 7, 72 L.Ed.2d 262 (1982)).[7] Because of the inconsistency between according state agency findings "substantial weight" and according them preclusive effect, the Court concluded that Congress did not intend for state agency findings to bind a federal court in a Title VII suit.

However, with respect to plaintiff's § 1983 claim, the Court reached the opposite conclusion because it found that – in contrast with Title VII – nothing in the language or legislative history of § 1983 "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797, 106 S.Ct. at 3226 (quoting *Allen v. McCurry*, 449 U.S. 90, 97, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980)). Observing that it had already approved the concept of administrative estoppel in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), and that administrative estoppel served the same "unifying" function as the Constitution's Full Faith and Credit Clause, the Court held that, absent a showing of contrary Congressional intent, "when a state

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the view in *dicta* that unreviewed state agency findings should *not* be entitled to preclusive effect in federal ADEA suits. *See also Frank v. Capital Cities Communications, Inc.*, 689 F.Supp. 334 (S.D.N.Y.1988) (declining to reach issue where preclusion not available on the facts at bar). The court in *Ibrahim v. New York State Department of Health*, 692 F.Supp. 1471, 1473-74 (E.D.N.Y.1988) adopted the Seventh Circuit's reasoning in *Duggan*, holding that unreviewed state agency findings are not preclusive in federal ADEA suits. Other decisions rendered prior to the Supreme Court's important decision in *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) need not be discussed.

[7] The Court also observed that it had already held in *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976) that a *federal* agency's rejection of an employment discrimination claim had no preclusive effect in a subsequent Title VII suit. *Id.*

agency 'acting in a judicial capacity . . . resolves disputed issues of fact before it which the parties have had adequate opportunity to litigate,' . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Id.*, 478 U.S. at 799, 106 S.Ct. at 3227 (quoting *Utah Construction*, 384 U.S. at 422, 86 S.Ct. at 1560).

Thus, *Elliott* teaches that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to "contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797, 106 S.Ct. at 3226. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.

That is precisely the way the Eighth Circuit read *Elliott* in its *Stillians* opinion. *Stillians* expanded upon the concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident:

> When interpreting a statute we should not forget what existed before it was enacted. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection*, 474 U.S. 494, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the rentention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952).

Id., 843 F.2d at 280-81 (brackets and ellipses in the original).

Stillians cautioned that, in determining whether a "statutory purpose" to displace common-law rules of preclusion is "evident," courts must set aside their own legislative and policy preferences and look solely to Congressional intent:

Thus, the most important lesson to be learned from *Elliott* is that when a federal statute does not specifically address a particular issue, in order to decide that issue we must ascertain Congressional intent. Title VII claims are not precluded [by unreviewed state agency findings] because the Court found evidence that Congress intended that result. Likewise, traditional rules of preclusion were left untouched by 42 U.S.C. § 1983 because that was the intent of Congress.

Ascertaining Congressional intent is often a difficult endeavor. When a statute does not speak on an issue and the legislative history is silent, we are forced to decide between two conflicting results. Our decision should not be based on our opinion of what direction the statute should take. If the result intended by Congress seems inconsistent with the overall objectives of the statute, so be it. Only Congress legislates and only Congress can amend.
Id., 843 F.2d at 280.

The opinion in *Stillians* went on to hold, in essence, that the presumption favoring retention of common-law rules of preclusion had not been rebutted where the ADEA's language and legislative history gave no indication of Congress's intent regarding the preclusive effect of unreviewed state findings. In reaching that conclusion, the Eighth Circuit found the ADEA's lack of any provision like § 2000e-5(b) highly probative, although not dispositive:

> One of the major factors in the Supreme Court's reasoning in *Elliott* was [42] U.S.C. § 2000e-5(b) which provides, in part, that the EEOC must "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 106 S.Ct. at 3225. Because giving substantial weight is inconsistent with giving preclusive effect, the Court had some indication of Congressional intent to guide it.
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> We believe that the absence of a similar provision from the ADEA goes far toward resolving the issue before us.

> While we may not wish to imply Congressional intent from the absence of a similar provision, the applicability of *Elliott* to the present case certainly is weakened by its absence. When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar.
> *Id.*, 843 F.2d at 281-82.

The court also reasoned that denying preclusive effect to state agency findings would reduce state agency proceedings to little more than a dress rehearsal for a subsequent federal suit under the ADEA:

> For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738 [requiring federal courts to give state court judgments the same preclusive effect they would have in state court], or filing suit anew in the federal district court. Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation.
> *Id.*, 843 F.2d at 282.

The Seventh Circuit, reaching the opposite conclusion in *Duggan*, construed the Supreme Court's decision in *Elliott* as requiring it to "determine whether there are enough parallels between Title VII and the ADEA to justify" the inference that, in drafting the ADEA, Congress meant to reject administrative estoppel. *Id.*, 818 F.2d 1294. In comparing the two statutory schemes, the Seventh Circuit—quite unlike the Supreme Court in *Elliott*—decided to focus on their respective "deferral

mechanisms," meaning the statutory provisions giving the appropriate state agency a "limited opportunity to consider [the claim] before the federal machinery can be set in motion." *Id.*, 818 F.2d at 1295.

First, the court noted that the deferral mechanisms of both Title VII and the ADEA support an inference that state agency findings are not entitled to deference. For example, both statutes permit state agency determinations to be superceded by federal agency action – after 60 days under Title VII, or by filing a claim directly with the EEOC under the ADEA. *Id.*, 818 F.2d at 1295-96 (citing Title VII, 42 U.S.C. § 2000e-5(c) and the ADEA, 29 U.S.C. § 633(b)). Under both statutes, concurrent or subsequent EEOC investigations would be rendered superfluous if the state agency findings had preclusive effect. Furthermore, the court found it "anomalous" to conclude that state agency findings should have preclusive effect when EEOC findings do not. *Id.*, 818 F.2d at 1295 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99, 93 S.Ct. 1817, 1822-23, 36 L.Ed.2d. 668 (1973)).[8]

Second, the court found that, to the extent that the ADEA's deferral mechanisms differed from Title VII's, the differences indicate that, "if anything, less deference is due state proceedings under the ADEA than under Title VII." *Id.*, 818 F.2d at 1296. Because the filing of a federal ADEA action stays any state proceedings, the ADEA – unlike Title VII – never affords the state agency a period of exclusive jurisdiction. *Id.*, 818 F.2d 1296 (citing 29 U.S.C. § 633(a)). Moreover, under the ADEA – unlike Title VII – the claimant can file charges with the EEOC and the

[8] The Supreme Court made the same observation in *dicta* in *Kremer*, 456 U.S. at 470 n. 7, 102 S.Ct. at 1891 n. 7, and this *dicta* became the basis of the Sixth Circuit opinion affirmed by the Supreme Court in *Elliott*. *See Elliott*, 478 U.S. at 793, 106 S.Ct. at 3223. However, as previously discussed, the Court's opinion in *Elliott* appeared to rely upon the inconsistency between the "substantial weight" standard of § 2000e-5(b) and the total preclusion available under common law. The Court did not reiterate or appear to rest its decision upon *Kremer's* statement in *dicta* that Congress would not have afforded state agency proceedings preclusive effect while denying such effect to EEOC findings.

state agency simultaneously. *Id.*, 818 F.2d at 1295-96 (citing 29 U.S.C. § 633(b)).

Third, the court addressed what it conceded to be the employer's "strongest argument": namely, that the Supreme Court in *Elliott* focused on Title VII's "substantial weight" provision, § 2000e-5(b), and not on the structure of Title VII's deferral mechanisms, in determining that Congress intended to displace the common law of preclusion in enacting the ADEA. The Seventh Circuit stated that § 2000e-5(b) "is simply the most obvious piece of evidence that administrative *res judicata* does not operate in a Title VII suit. Thus, it is not surprising that the Court in *Elliott* heavily relied on this provision. The absence of a comparable section in the ADEA is certainly not fatal to [plaintiff]." *Id.*, 818 F.2d at 1296.[9]

[9] Relying on a footnote in *Kremer*, the Seventh Circuit noted that the legislative history of the 1972 amendments to Title VII indicates that Congress added the "substantial weight" provision of § 2000e-5(b) in order to *increase* the EEOC's deference to state agency findings, which the EEOC previously had been free to ignore. The court concluded that it would be "far-fetched" to construe the ADEA's *lack* of a provision *increasing* deference to state agency findings as indicating that Congress intended to give preclusive effect to such findings. *Id.*, 818 F.2d at 1297 (citing *Kremer*, 456 U.S. at 470 n. 8, 102 S.Ct. at 1892 n. 8).

It is true, as the Seventh Circuit observed, that in *Kremer*, the Supreme Court invoked this bit of legislative history to find that Title VII's "substantial weight" provision could not have implicitly repealed a federal statute (28 U.S.C. § 1738) granting state court judgments "full faith and credit" in federal court. However, in the same footnote, the Court found it "even more implausible" to find an implied repeal of § 1738 in Title VII's *deferral* provision, 42 U.S.C. § 2000e-5(c) – the very provision upon which the Seventh Circuit's analysis largely turns. *Kremer*, 456 U.S. at 470 n. 8, 102 S.Ct. at 1892 n. 8.

In short, *Kremer* features language inconsistent with the reasoning of *both* the Seventh and Eighth Circuits. Moreover, its reading of § 2000e-5(b) is manifestly inconsistent with *Elliott's* reading of the same provision. Since *Kremer* is not as recent as *Elliott*, and since *Kremer* involved the preclusive effect of a state *court* judgment under § 1738 rather than the preclusive effect of an unreviewed state agency finding under the federal common-law rules of preclusion applicable here, the court will be guided by *Kremer* only where it is consistent with *Elliott*. *See Elliott*, 478 U.S. at 794, 106 S.Ct. at 3224.

The Seventh Circuit's opinion depends upon its debatable assumption that the Supreme Court in *Elliott* became so thoroughly distracted by "the most obvious piece of evidence"—*i.e.*, the "substantial weight" provision contained in § 2000e-5(b)—that it failed to articulate the true basis of its decision—*i.e.*, the lack of deference implicit in the structure of Title VII's "deferral mechanisms." This court will not make that assumption. The Supreme Court is capable of articulating its reasoning and its reasoning in *Elliott* is clearly articulated.

Furthermore, the Seventh Circuit's opinion improperly conflates the issues of "deferral" and "preclusion." The Supreme Court has not been receptive to similar attempts to read more into the deferral provisions of Title VII and the ADEA than the structure and purpose of those provisions will support. *See Kremer*, 456 U.S. at 470 n. 7, 102 S.Ct. at 1891 n. 7 (it would be "implausible" to find that Title VII's deferral provision implicitly repealed the federal statute granting state court judgments preclusive effect in federal court when "that [deferral] provision does not even address the issue of the proper weight to be afforded state decisions"); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756-57, 99 S.Ct. 2066, 2071-72, 60 L.Ed.2d 609 (1979) (rejecting argument that differences between deferral provisions of Title VII and ADEA indicated that "the ADEA pays less deference to state agencies and that, as a consequence, ADEA claimants have the option to ignore state remedies").

Deferral and preclusion are not equivalent in effect or purpose. Deferral mechanisms simply give the state agency the "first crack" at the claim. Preclusion, in contrast, gives the state agency the "last word" on the claim in a limited class of cases (*i.e.*, those in which the state agency rules within 60 days, or rules after 60 days but before the claimant files a federal action. *See* 29 U.S.C. § 633(a) and (b)). Deferral "is intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Evans*, 441 U.S. at 756, 99 S.Ct. at 2071. While preclusion, like deferral, helps conserve judicial resources, it "also serves the value of federalism," and, like the Constitution's Full Faith and Credit clause, " 'act[s] as a nationally unifying force.' " *Elliott*, 478 U.S.

at 798-99, 106 S.Ct. at 3226-27 (quoting *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 289, 100 S.Ct. 2647, 2664, 65 L.Ed.2d 757 (1980) (White, J., concurring in judgment)). Thus, preclusion serves a more important value than deferral, and statutory deferral mechanisms are not an accurate indicator of Congressional intent to displace common-law rules of preclusion.

Rather than comparing the ADEA's deferral mechanisms to those in Title VII, the proper inquiry under *Elliott* is whether or not any provision of the ADEA evinces a Congressional intent to "contravene the common-law rules of preclusion[.]" *Elliott*, 478 U.S. at 797, 106 S.Ct. at 3226; *accord Stillians*, 843 F.2d at 281.[10] More specifically, the approach taken by the Supreme Court in *Elliott* dictates that the court examine the ADEA to see whether it contains any provision—like the "substantial weight" provision of Title VII—which addresses the issue of the proper weight to be afforded state agency findings, and which accords such findings something less than preclusive effect.

The court finds no such provision in the ADEA. Moreoever, had Congress wanted to demonstrate an intent to displace the common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII. As the Eighth Circuit stated in *Stillians*, "[o]nly Congress legislates and only Congress can amend." *Id.*, 843 F.2d at 280. This court would be implicitly amending the ADEA if it were to hold that the ADEA displaces common-law rules of preclusion. The court declines to do this. Rather, following *Elliott* and *Stillians*, it will adhere to the presumption that state findings—including

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[10] The Eighth Circuit recognized this in *Stillians* when it rejected the Seventh Circuit's methodology of "reason[ing] by analogy" from the provisions of Title VII:

> Comparing the ADEA with Title VII and 42 U.S.C. § 1983 [as the Seventh Circuit did in *Duggan*] does not address the ultimate issue whether Congress intended to abrogate traditional rules of preclusion when it enacted the ADEA. Even if the ADEA more closely parallels Title VII and § 1983, if Congress did not intend to abrogate preclusion when it enacted the ADEA, then preclusion should still apply. We should not reason by analogy when interpreting statutes. The proper analysis is to examine the ADEA on its own rather than merely compare and contrast it with Title VII. *Id.*, 843 F.2d at 281 (footnote omitted).

unreviewed state agency findings – can have preclusive effect in an ADEA action in federal court.

This result does not denigrate the important right protected by the ADEA. The Supreme Court in *Elliott* found that unreviewed state agency findings have preclusive effect even in cases brought under 42 U.S.C. § 1983 to vindicate fundamental liberty and property rights guaranteed by the Constitution. There is no reason to suppose that a right created by statute should be accorded greater solicitude, absent a showing that Congress intended to do so.

[4] The court also rejects plaintiff's argument that the hearing afforded him by the state agency failed to meet the requirements of constitutional due process.

The elements of administrative estoppel are:

1) the agency was acting in a judicial capacity;

2) the disputed issues of fact were properly before the agency and the parties were given an adequate opportunity to litigate them; and

3) the courts of that particular state would give the agency's factfinding determinations preclusive effect. *Elliott*, 478 U.S. at 797-98, 106 S.Ct. at 3225-26 (quoting *Utah Construction*, 384 U.S. at 422, 86 S.Ct. at 1560); *Kirkland v. City of Peekskill*, 828 F.2d 104, 107 (2d Cir.1987).

The agency obviously was acting in a judicial capacity, and the court's independent reading of the hearing transcript persuades it that the parties – each of whom were represented by counsel – had adequate opportunity to litigate the factual disputes resolved by the agency. Moreover, the Supreme Court has confirmed the constitutional adequacy of a virtually identical procedure used by the same New York agency to adjudicate employment discrimination charges. *Kremer*, 456 U.S. at 479-85, 102 S.Ct. at 1896-99; *accord Kirkland*, 828 F.2d at 107-09. Finally, the Second Circuit has held that New York state courts would

give preclusive effect to a DHR hearing. *Kirkland*, *supra*. *See also Brugman v. City of New York*, 102 A.D.2d 413, 477 N.Y.S.2d 636 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 1011, 489 N.Y.S.2d 54, 478 N.E.2d 195 (1985). Thus, all the elements of administrative estoppel have been satisfied here.

Having determined that unreviewed state agency findings can have preclusive effect in a federal ADEA suit, and that the unreviewed state agency finding in this case is entitled to such deference, all that remains is to determine the effect of those findings on plaintiff's cause of action under the ADEA. The state agency found the following facts:

> The record considered as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports respondent's position that complainant was terminated because the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's Mortgage Origination Department. There is no evidence in the file that complainant's age was a factor in his termination.

Determination and Order After Investigation, annexed as Exhibit 6 to the Moving Affidavit of Anthony H. Atlas.

Since these findings bind this court, the plaintiff cannot prove his claim under the ADEA that his employer "discharge[d him] or otherwise discriminate[d] against [him] with respect to his compensation, terms, conditions, or privileges of employment, because of [his] age[.]" 29 U.S.C. § 623(a)(1).

Accordingly, defendant's motion for summary judgment is granted.

SO ORDERED.

EXCERPTS FROM AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization–

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization–

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that any employee aged 65 through 69, and any employee's spouse aged 65 through 69, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g)[1] Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the–

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownerhsip or financial control,

of the employer and the corporation.

(Publ.L. 90-202, § 4, Dec. 15, 1967, 81 Stat. 603; Pub.L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub.L. 97-248, Title I, § 116(a), Sept. 3, 1982, 96 Stat. 353; Pub.L. 98-369, Title III, § 2301(b), July 18, 1984, 98 Stat. 1063; Pub.L. 98-459, Title VIII, § 802(b), Oct. 9, 1984, 98 Stat. 1792.)

[1] So in original. Two subsecs. (g) have been enacted.

[See main volume for text of (a) to (f)]

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(i)[1] Employees pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such

employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(As amended Pub.L. 99-272, Title IX, § 9201(b)1), (3), Apr. 7, 1986, 100 Stat. 171; Pub.L. 99-509, Title IX, § 9201, Oct. 21, 1986, 100 Stat. 1973; Pub.L. 99-592, §§ 2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342; Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233.)

[1] So in original. Two subsecs. (i) have been enacted.

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

(Pub.L. 90-202, § 14, Dec. 15, 1967, 81 Stat. 607.)

EXCERPTS FROM NEW YORK HUMAN RIGHTS LAW

§ 296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

§ 298. Judicial review and enforcement

Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the board, in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court of the state in the judicial department embracing the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record of all prior proceedings and the issuance and service of a notice of motion returnable before such appellate division of the supreme court. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of fact on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and by the court of appeals as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with

the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. Any appeal under this section and any proceeding, if instituted under article seventy-eight of the civil practice law and rules to which the division or the board is a party shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within thirty days after the service of such order.

L.1951, c. 800; amended L.1952, c. 285, § 7; L.1962, c. 310, § 135; L.1968, c. 958, § 8; L.1978, c. 225, § 1.

§ 298. Judicial review and enforcement [As amended, 1985]

Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complairt may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the court, in a proceeding as provided in this section. Such proceeding shall be brought in the supreme court in the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a notice of petition and petition in such court. Thereafter, at a time and in a manner to be specified by rules of court, the division shall file with the court a written transcript of the record of all prior proceedings. Upon the filing of a notice of petition and petition, the court shall have jurisdiction of the proceeding and of the questions determined therein, except that where the order sought to be reviewed was made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety-seven of this article, the court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided

he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and any appeal taken from its judgment or order shall be reviewed by the appropriate appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the courts over these proceedings, as provided for herein, shall be exclusive and their judgments and orders shall be final, subject to appellate review in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. Any appeal under this section and any proceeding, if instituted under article seventy-eight of the civil practice law and rules to which the division or the board is a party shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within sixty days after the service of such order.

(As amended L.1984, c.83, § 3; L1985, c. 340, § 1; L.1988, c. 505, § 1.)

STATE OF NEW YORK
Executive Department

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center *NOTICE OF ORDER*
New York, New York 10047
Tel: 488-2038 (area code 212)

To: All Parties to this Proceeding – APPEAL NO. 8948

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Please note:

> "A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461 (1982)."

Attachment:

Form B8

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD *O R D E R*

Case No. 1 E-E-A-82-82993A
APPEAL NO. 8948
HEARING SCHEDULED: December 21, 1983

ANGELO J. SOLIMINO,

Complainant-Appellant

– vs. –

ASTORIA FEDERAL SAVINGS AND LOAN,

Respondent

PRESIDING: Honorable Tibby Blum

SUBMISSION ON THE RECORD:

Complainant-Appellant submits on the record

Respondent deemed submitted on the record

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *State Division of Human Rights* v. *Columbia University, et al*, 39 N.Y.2d 612 and *State Office of Drug Abuse* v. *State Human Rights Appeal Board*, 48 N.Y.2d 276, and

A majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or characterized by an abuse of discretion, it is

ORDERED that the Determination and Order of the State Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

s/

Thomas A. Conniff
Acting Chairman

Dated & Mailed: May 30, 1984
TO: (See list attached)

STATE HUMAN RIGHTS APPEAL BOARD APPEAL NO. 8948

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(2)

No. 89-1895

Supreme Court, U.S.
FILED
JUL 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent herein respectfully submits his Brief in Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

I.

THE ASSERTED CONFLICT IN CIRCUIT COURT DECISIONS HAS BEEN SUBSTANTIALLY ELIMINATED

Although the Petitioner's Brief contains extensive reargument of the merits of the Second Circuit's decision herein, the only proper question currently before this Court is whether there is a good reason for this Court to assume jurisdiction to hear Petitioner's appeal of said decision. Obviously, not every conflict in the Circuits warrants corrective action by this Court. Here, the particular conflict described is quite unlikely to continue in the future because the sheer weight of authority on

this issue has clearly been determined. Thus, although there exists a facial conflict between the Eighth Circuit's decision in Stillians, on the one hand, and the Seventh and Second Circuit decisions in Duggan and Solimimo, on the other, that conflict is not likely to have any continuing legal significance for other federal courts. A brief perusal of the three (3) decisions will show that the reasoning strength of the Second and Seventh Circuit decisions far outweighs that of the Eighth Circuit (which itself was a 2 to 1 decision). As is evident from a perusal of the three (3) decisions, the Stillians decision is somewhat cursory, reflects inadequate research on statutory exegesis, and fails to address the substantial pieces of evidence in the ADEA itself that Congress never intended to mandate state agency

preclusion. On the other hand, the Duggan and Solimimo decisions are so carefully and thoroughly reasoned that it is doubtful that any other district court in the future would be likely to follow the Stillians approach.

II.

THE COURT SHOULD NOT HAVE TO INTERPRET ITS OWN DECISION IN ELLIOTT BECAUSE THAT DECISION IS CLEAR AND CONTROLLING

Respondent submits that the Second Circuit decision herein has served to resolve the conflict argument being made by Petitioner, in that the Second Circuit has carefully examined and compared Stillians with Duggan and has clearly demonstrated the flawed reasoning in Stillians, along with many other factors and considerations, that definitively militate against agency preclusion under ADEA.

The issue is further simplified by the fact that this Court has already carefully fixed, in the Elliott case, which is unquestionably controlling, the parameters for the type of analysis to be undertaken in resolving the type of issue raised at bar. There can be no doubt that the analysis used in that decision for Title VII cases can and should be applied to the ADEA. Thus, there is no reason for this Court to repeat what it has already said in Elliott.

Nor would it make any sense for this Court, having itself already set forth in Elliott the guidelines for the lower courts to follow in deciding agency preclusions issues, to find itself having to repeat what it said by taking the lower courts by the hand to show them just how to apply that analysis. A different result might be reached if

Elliott were controversial; but Elliott itself has not stirred any debate. Nor is there any claim by either side that Elliott is wrongly decided or unclear. Yet, if this Court agrees to take jurisdiction of this case, it will necessarily mean that the Elliott guidelines were somehow not clear or appropriate when promulgated -- a result contrary to the facts. For this reason, this Court should decline to issue yet another decision explaining Elliott and revisiting the agency preclusion issue when Elliott itself, the governing law on this point, is sufficiently clear.

CONCLUSION

For the foregoing reasons, the Court should deny issuance of a writ of certiorari with respect to the judgment and opinion of the Second Circuit herein.

Dated: July 23, 1990

Respectfully
Submittted,

LEONARD N. FLAMM
HOCKERT & FLAMM

JOSEPH J. GENTILE

Attorneys for Respondent

Supreme Court, U.S.
FILED
DEC 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1895

In the Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

ANGELO J. SOLIMINO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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21 pp

QUESTION PRESENTED

Whether, in a federal court action under the Age Discrimination in Employment Act, state agency findings of fact that have not been judicially reviewed have preclusive effect.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1895

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

ANGELO J. SOLIMINO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Astoria Federal Savings and Loan Association (Astoria) employed respondent Angelo J. Solimino from October 4, 1945, through March 5, 1982. On the latter date, Astoria terminated Solimino—then 63 years old—from his position as vice president of the Mortgage Origination Department. Pet. App. A3. On March 18, 1982, Solimino filed a charge of age discrimination with the Equal Em-

ployment Opportunity Commission (EEOC or Commission). *Ibid.* The EEOC referred his complaint to the New York State Department of Human Rights (DHR) pursuant to a worksharing agreement between the EEOC and DHR. *Ibid.*[1] On January 25, 1983, DHR dismissed the complaint, finding that the record before it contained no evidence that Solimino was terminated because of his age.[2] On May 30, 1984, the State Human Rights Appeal Board (Board) affirmed this ruling, concluding that DHR's dismissal of the complaint "was not arbitrary, capricious or characterized by an abuse of discretion." Pet. App. A45. Solimino did not seek judicial review of the Board's ruling. *Id.* at A4.[3]

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[1] Under the worksharing agreement then in effect, the EEOC referred certain age discrimination cases to DHR for investigation and attempted resolution under the New York Human Rights Law, N.Y. Exec. Law, §§ 290 *et seq.* (McKinney 1982 & Supp. 1990).

[2] The relevant findings by DHR were made following a hearing at which Astoria and Solimino were each represented by legal counsel. Pet. App. A28. DHR's findings are quoted in the district court's opinion:

> The record considered as a whole does not support [Solimino's] allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports [Astoria's] position that [Solimino] was terminated because the position of Vice President which [Solimino] held was eliminated due to the low volume of work performed by [Astoria's] Mortgage Origination Department. There is no evidence in the file that [Solimino's] age was a factor in his termination.

Pet. App. A29.

[3] Under the law then in effect, judicial review of Board decisions was available in the Appellate Division of the New York State Supreme Court. 1984 N.Y. Laws, ch. 83, § 3. In such review, findings of fact by DHR were accorded conclusive effect "if supported by sufficient evidence on the record considered as a whole." *Ibid.* The Board was abolished in 1984, soon after it upheld the DHR ruling at issue here. 1984 N.Y. Laws, ch. 83, § 2. Currently, judicial review of DHR decisions is obtained by initiating a proceeding in the trial-level state Supreme Court for the appropriate county. N.Y. Exec. Law § 298. As before, findings of fact by DHR are conclusive "if supported by sufficient evidence" in the record as a whole. *Ibid.*

2. On February 21, 1985, Solimino filed an action against Astoria in the United States District Court for the Eastern District of New York. He alleged that Astoria, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, had discriminated against him on the basis of age by denying him salary increases and promotions and by terminating him. Pet. App. A15. Astoria moved for summary judgment on the grounds that the action was barred by the statute of limitations and was precluded by DHR's dismissal of respondent's complaint. *Id.* at A4. The district court held that respondent's action was precluded by the DHR ruling and therefore granted summary judgment in favor of Astoria. Pet. App. A14-A29.[4]

In its analysis, the district court noted that two courts of appeals—the Seventh and Eighth Circuits—had addressed the issue whether judicially unreviewed agency factfinding has preclusive effect in actions under the ADEA. Pet. App. A19 (citing *Stillians* v. *Iowa*, 843 F.2d 276 (8th Cir. 1988); *Duggan* v. *Board of Educ.*, 818 F.2d 1291 (7th Cir.

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[4] The court refused to grant summary judgment on statute of limitations grounds. Pet. App. A16-A18. The court determined that there were disputed issues of fact concerning the date on which the cause of action accrued. *Ibid.*

1987)). The court observed that these courts had come to opposite conclusions based on "divergent interpretations of [this Court's] decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 * * * (1986)." Pet. App. A19. The district court's subsequent analysis largely reflected the approach embraced by the Eighth Circuit in *Stillians*.

The district court understood *Stillians* to "expand[] upon [a] concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident." Pet. App. A21. This presumption, in the court's view, could be overcome only by statutory language or legislative history that (1) "actually addresses" whether facts found by an agency but not reviewed by a court are to have preclusive effect, and (2) "accords them something less than preclusive effect." *Ibid.*[5] Applying this test, the court concluded that judicially unreviewed agency factfinding does have preclusive effect under the ADEA. The court reasoned that the ADEA does not "contain[] any provision * * * like the 'substantial weight' provision of Title VII," *id.* at A27.[6]

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[5] The court deemed irrelevant the provisions in the ADEA that provide for state agency proceedings to be superseded by actions under the statute (29 U.S.C. 633(a)) and that permit concurrent investigations of discrimination claims by state agencies and the EEOC (29 U.S.C. 633(b)). In the court's view, these "statutory deferral mechanisms [were] not an accurate indicator of Congressional intent." Pet. App. A27.

[6] The "substantial weight" provision to which the court referred was added to Title VII in 1972 and requires the EEOC to "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 42 U.S.C. 2000e-5(b).

The court further held that DHR's proceedings had preclusive effect in this case and afforded respondent due process because they satisfied the requirements for administrative estoppel: DHR acted in a judicial capacity, gave the parties an adequate opportunity to litigate disputed facts, and made findings of fact that would be accorded preclusive effect in state courts. Pet. App. A28-A29; see notes 2 & 3, *supra*. Finally, the court held, DHR's factual findings precluded respondent from proving a violation of the ADEA. Pet. App. A29.

3. The Second Circuit reversed and remanded. Pet. App. A1-A13. Relying primarily on the Seventh Circuit's analysis in *Duggan*, the court held that judicially unreviewed agency factfinding does not have preclusive effect in an ADEA suit.

Contrary to the district court's approach, the court of appeals framed the issue as one of congressional intent. Pet. App. A6. It rejected the notion that "the absence of the phrase 'substantial weight' from the ADEA disposes of the preclusion issue." *Id.* at A12. The court of appeals acknowledged that, in interpreting Title VII, "the presence of the [substantial weight] provision is dispositive because logically incompatible with preclusion." *Id.* at A12 n.7. But the court reasoned that "other considerations may also justify the conclusion that Congress intended no preclusion." *Ibid.*

One such consideration was the ADEA's deferral mechanism. The court found evidence that Congress contemplated suits following agency decisions against

grievants in Section 14(b), which provides that grievants may not file suit "before the expiration of sixty days after proceedings have been commenced under State law, *unless such proceedings have been earlier terminated.*" Pet. App. A6 (quoting 29 U.S.C. 633 (b)). The court found further evidence that Congress did not intend preclusion in the ADEA provisions that permit state agencies and the EEOC to investigate discrimination complaints concurrently. *Ibid.* (citing 29 U.S.C. 626(d) and 633(b)). "If Congress had intended preclusion from judicially unreviewed state agency findings, 'the concurrent or subsequent EEOC investigation would be superfluous.'" Pet. App. A6-A7 (quoting *Duggan*, 818 F.2d at 1295). Finally, the court determined that preclusion would be inconsistent with the purpose of Section 14(a) of the ADEA, which provides that "upon commencement of action under this chapter such action shall supersede any State action," 29 U.S.C. 633(a). Quoting this Court, the court of appeals observed that "Congress enacted the sixty-day deferral mechanism * * * 'to screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings.'" Pet. App. A7 (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979) (emphasis supplied by court of appeals)). These provisions, the court concluded, showed that Congress did not intend to bar federal court review of complaints that were not settled to the grievant's satisfaction. Pet. App. A7-A8.[7]

[7] The court noted that its conclusion was supported by the legislative history, which "articulated dissatisfaction with some state remedies to redress age discrimination." Pet. App. A8.

In addition to examining the ADEA, the court of appeals looked to principles enunciated by this Court in construing Title VII, 42 U.S.C. 2000e *et seq.* The court observed that in *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 470 n.7 (1982), this Court indicated "that decisions of the EEOC do not preclude *de novo* fact-finding by a federal court and that Congress could not have intended the federal courts to be bound by the fact-finding of state administrative agencies when they are not bound by findings of the EEOC." Pet. App. A8.[8] The Court in *Kremer* also stated that "unreviewed administrative determinations by state agencies . . . should not preclude [*de novo* federal court] review even if such a decision were to be afforded preclusive effect in a State's own courts." Pet. App. A9 (quoting *Kremer*, 456 U.S. at 470 n.7). These principles, the court of appeals determined, "apply as well to ADEA cases." Pet. App. A9.[9]

The court noted that the EEOC shared its view, and that the EEOC's interpretation was entitled to

[8] The court below quoted the Seventh Circuit for the same proposition. Pet. App. A8-A9 (quoting *Duggan*, 818 F.2d at 1295: "It would . . . be anomalous to conclude that unreviewed state administrative determinations must be given preclusive effect by federal courts when the findings of the EEOC itself do not preclude *de novo* judicial review.").

[9] In the court's view, the differences between the ADEA and Title VII indicate that principles regarding preclusion enunciated in the Title VII context apply *a fortiori* when interpreting the ADEA. Pet. App. A10-A11. The court noted that (1) ADEA grievants are required to wait less time than Title VII grievants between commencing state agency proceedings and filing an action under the federal statute; and (2) under Title VII, state agencies enjoy an initial period of exclusive jurisdiction over discrimination claims that they are not afforded under the ADEA. *Id.* at A11.

deference in light of the agency's responsibility for enforcing the ADEA. Pet. App. A12. Deference was particularly appropriate because the EEOC adopted this interpretation prior to 1986, when Congress amended the ADEA extensively but did not disturb that interpretation. Pet. App. A12, A13 n.9 (citing EEOC Compl. Man. (CCH) ¶ 285, § 5.5(a)(2) (May 1985)).

Based on similar reasoning, the court viewed Congress's failure to add a "substantial weight" provision to the ADEA differently from the district court. Congress added such a provision to Title VII in 1972 because at that time the EEOC accorded no weight to state agency findings. Pet. App. A12-A13 (citing *Kremer*, 456 U.S. at 474-475, 475 n.16). In contrast, when Congress amended the ADEA in 1986, the EEOC already accorded substantial weight to state agency findings in age discrimination cases. Pet. App. A13. Congress's failure to add a "substantial weight" provision to the ADEA was therefore consistent with the view that unreviewed agency findings do not have preclusive effect. *Id.* at A13 n.9.[10]

DISCUSSION

We agree with petitioner that this Court should review the question whether, in a suit under the ADEA, state agency findings of fact that have not

[10] The court also found support for its interpretation in another consistent feature of EEOC practice, namely, the referral of certain age discrimination complaints, including respondent's, to state agencies for investigation. The court considered it unlikely that "a grievant who is obligated to file a complaint with the EEOC * * * and who has no control over the EEOC's decision to refer the case to the state agency should be bound by an adverse, judicially unreviewed [state agency] decision." Pet. App. A10.

been judicially reviewed have preclusive effect. Unlike petitioner, however, we believe that the Second Circuit decided this issue correctly.

1. There is a clear conflict among the courts of appeals as to whether judicially unreviewed administrative factfinding is preclusive under the ADEA. The holdings by both the Second Circuit in this case and the Seventh Circuit in *Duggan* v. *Board of Educ.*, 818 F.2d 1291 (1987), directly conflict with the Eighth Circuit's holding in *Stillians* v. *Iowa*, 843 F.2d 276 (1988). In addition, opinions in the Ninth and the Eleventh Circuits, without addressing the issue squarely, have expressed conflicting views.[11]

As a result of this disagreement, the rights of an ADEA grievant vary according to geography. A grievant in respondent's circumstances whose cause of action arises in the Second or Seventh Circuits has

[11] In *Mack* v. *South Bay Beer Distrib.*, 798 F.2d 1279, 1283 (1986), the Ninth Circuit assumed without discussion that an unreviewed state administrative decision would have preclusive effect in an ADEA suit, but held that the decision at issue there was not preclusive because in the administrative proceedings the "parties did not have an adequate opportunity to litigate [plaintiff's] age discrimination claims." In *Delgado* v. *Lockheed-Georgia, Inc.*, 815 F.2d 641, 646 (1987), the Eleventh Circuit found "persuasive" the argument that unreviewed agency factfinding has no preclusive effect under the ADEA. See also *Corrente* v. *St. Joseph's Hosp. & Health Center*, 730 F. Supp. 493, 499 & n.8 (N.D.N.Y. 1990) (assuming that "unreviewed determinations of state agencies do as a general rule have preclusive effect in subsequent ADEA cases"); *Ibrahim* v. *New York State Dep't of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988) (relying on *Duggan* to hold that unreviewed agency factfinding does not have preclusive effect under ADEA); *Frank* v. *Capital Cities Communications, Inc.*, 689 F. Supp. 334, 337-338 (S.D.N.Y. 1988) ("assuming (without deciding)" that unreviewed agency factfinding does have preclusive effect under ADEA).

a right of access to the federal courts; a grievant whose cause accrues in the Eighth Circuit does not. A grievant whose cause of action arises elsewhere faces uncertainty over whether the pursuit of an age discrimination claim in a state agency will preclude judicial relief in federal court.

Moreover, uncertainty as to the effect of state agency factfinding hampers the EEOC's ability to enforce the ADEA. The EEOC has negotiated worksharing agreements with 46 state and local agencies that have authority to enforce state and local laws prohibiting age discrimination in employment. Under a typical agreement, certain age discrimination claims are referred to state agencies for processing, effectively giving state or local agencies a period of exclusive jurisdiction of the sort they enjoy under Title VII. See 42 U.S.C. 2000e-5(c). The Commission believes such agreements further Congress's intent to provide States an opportunity promptly to resolve complaints of age discrimination without undue inconvenience or expense to the parties. These agreements also help conserve the EEOC's limited enforcement resources.

The Commission's view as to the desirability of these worksharing agreements, however, has been based on its position that factfinding by state agencies does not preclude either the EEOC or the federal courts from reviewing ADEA claims. As indicated above, it is the EEOC's position that Congress intended such factfinding to be accorded substantial weight, but not preclusive effect. Doubt as to the correctness of this position impedes renegotiation of existing worksharing agreements and the conclusion of such agreements in areas where they are not yet in effect.

2. Although the issue that has divided the circuits merits review, the Second Circuit was correct, in our

view, in holding that judicially unreviewed agency factfinding does not have preclusive effect.

The court of appeals correctly framed the issue as one of congressional intent. This Court took the same approach when it considered the same issue in the context of Title VII and of 42 U.S.C. 1983 in *University of Tennessee* v. *Elliott*, 478 U.S. 788, 796 (1986). There, the Court framed the issue as "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII [and Section 1983]." *Ibid.*

By the same token, the district court erred when it read *Elliott* "implicit[ly]" to adopt a presumption that administrative preclusion is "appropriate in any federal cause of action." Pet. App. A21. *Elliott* does not assume the existence of any such sweeping rule of administrative preclusion. On the contrary, this Court made clear that a case-by-case inquiry is necessary; it began by observing that the Court had "frequently fashioned federal common-law rules of preclusion," *Elliott*, 478 U.S. at 794, and then considered "whether a rule of preclusion [was] appropriate" for claims under Title VII or Section 1983, *id.* at 795.[12]

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[12] The district court relied (Pet. App. A20-A21) on the passage in *Elliott*, 478 U.S. at 797, in which this Court quoted *Allen* v. *McCurry*, 449 U.S. 90, 97-98 (1980), to the effect that Section 1983 does not "express[] any congressional intent to contravene the common-law rules of preclusion." It is clear from the context of this quotation that the district court's reliance was misplaced. The quotation follows the Court's observation that because *Allen* concerned, not the common law of preclusion, but the statute that requires federal courts to give preclusive effect to state court judgments, 28 U.S.C. 1738, the holding in *Allen* did not address the effect to be accorded unreviewed administrative findings. *Elliott*, 478 U.S. at 796. Addressing that question in *Elliott*, the

With respect to Title VII, the Court in *Elliott* did not end its inquiry upon determining, in light of that statute's "substantial weight" provision, that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal courts." 478 U.S. at 795. The Court also relied on *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), observing that in the latter case the Court "review[ed] in considerable detail the language of Title VII and the history of the 1972 amendments to the statute." *Elliott*, 478 U.S. at 795. The conclusion in *Chandler* —that Congress intended to accord federal employees the same right to a trial *de novo* after adverse agency decisions that non-federal employees enjoy—was applicable to the case before the Court in *Elliott*. It is, we believe, clear from the *Elliott* Court's reference to its prior analysis in *Chandler* that *Elliott* was not based solely on the "substantial weight" provision in Title VII.

Here, the court of appeals was faithful to *Elliott*'s approach when it eschewed exclusive reliance on the absence of a "substantial weight" provision in the ADEA and considered whether "other considerations * * * justif[ied] the conclusion that Congress intended no preclusion." Pet. App. A12 n.7. See also *Duggan*, 818 F.2d at 1297 ("The absence of a com-

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Court looked for evidence that Congress "wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century." 478 U.S. at 797. The Court found no evidence to prevent it from "fashioning federal common-law rules of preclusion" (*id.* at 799) for claims under Section 1983.

parable section in the ADEA is certainly not fatal to [the grievant]."). [13]

Like this Court in *Elliott*, the court of appeals examined the text, history, and policies of the statute at issue for evidence of Congress's intent regarding the effect of unreviewed administrative factfinding. Pet. App. A6-A8. The court also considered principles enunciated in decisions of this Court construing Title VII. *Id.* at A8-A9. It was entirely appropriate to take these principles into account, since both the substantive and many of the procedural provisions of the ADEA are derived from Title VII. See *EEOC* v.

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[13] The district court, in contrast, misread *Elliott* when it ended its inquiry upon determining that the ADEA does not "contain[] any provision—like the 'substantial weight' provision of Title VII—which addresses the issue of the proper weight to be afforded state agency findings, and which accords such findings something less than preclusive effect." Pet. App. A27. Beyond that, the district court misinterpreted the significance of the absence of a "substantial weight" provision, as is clear from its belief that, "had Congress wanted to demonstrate an intent to displace common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII." Pet. App. A27. Congress had no occasion to evidence such an intent when it amended the ADEA in 1986, because the EEOC already accorded substantial weight to unreviewed factfinding by state agencies concerning age discrimination claims. See EEOC Compl. Man. (CCH) ¶ 285, § 5.5(a)(2) (May 1985). Congress's failure to alter the EEOC's practice when amending the ADEA in other significant respects suggests, if anything, acquiescence in this practice. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Under these circumstances, the court of appeals was clearly correct to accord deference to the EEOC's interpretation of the ADEA. Pet. App. A12 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Commercial Office Prods. Co., 486 U.S. 107, 123 (1988); *Oscar Mayer*, 441 U.S. at 755; *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985); *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); see also *Yellow Freight Sys., Inc.* v. *Donnelly*, 110 S. Ct. 1566, 1570 (1990).

The court of appeals also properly found support for its interpretation in the deferral provisions of the ADEA. See Pet. App. A6-A7. As the court recognized (*id.* at A7), the purpose of the ADEA's limited referral of age discrimination claims to state and local agencies is to provide for prompt and convenient settlement of complaints "to the satisfaction of the grievant." *Ibid.* (quoting *Oscar Mayer*, 441 U.S. at 756). According agency proceedings preclusive effect would be inconsistent with this purpose, for it would foreclose judicial review of claims that were *not* settled to the grievant's satisfaction in state proceedings. As the Seventh Circuit stated, "[g]iven the multiple forums provided for in Title VII and the ADEA and the place of the state agency and EEOC in the process as informal agents of reconciliation, it is unlikely that Congress intended the process to effectively stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." *Duggan*, 818 F.2d at 1295.[14]

[14] The district court believed that, if respondent had brought his age discrimination action in state court, DHR's judicially unreviewed ruling would have been accorded preclusive effect. Pet. App. A28-A29 (citing *Kirkland* v. *City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987)). See also 29 U.S.C. 626(c)(1) (authorizing ADEA grievants to bring action "in any court of competent jurisdiction"). Assuming this is so, that does not resolve the question whether Congress intended federal courts to accord such findings the same effect. As this Court observed in *Kremer* with respect to Title VII,

To be sure, this understanding of the ADEA's deferral mechanism imputes to Congress an intent to favor unsatisfied grievants over employers who have successfully defended against charges of age discrimination before the state agency. This result, obviously, has the potential to spawn duplicative litigation in federal court after completion of what may well have been thorough and comprehensive state administrative proceedings—a potential that follows from any decision denying preclusion. Whatever the wisdom of such a regime, that this was nonetheless Congress's intent is strongly suggested by the supersedure provision in Section 14 of the ADEA, 29 U.S.C. 633. Section 14 clearly entitles grievants to supersede ongoing agency proceedings by filing suit 60 days after the proceedings begin. 29 U.S.C. 633. Since Section 14 also permits grievants to file suit sooner if agency proceedings are "earlier terminated," 29 U.S.C. 633(b), it appears to contemplate suits by grievants for whom agency proceedings terminated adversely. If the grievant won the earlier terminated proceeding, then he obviously would have no reason to go to federal court. Yet petitioner's position is that if the grievant lost, he could not.

"Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review *even if such a decision were to be afforded preclusive effect in a State's own courts.*" 456 U.S. at 470 n.7 (emphasis added). See also 5 U.S.C. 7703(c) (giving federal employees who litigate age discrimination claims before the EEOC and the Merit Systems Protection Board the right to trial *de novo* in actions under ADEA); *Rosenfeld* v. *Department of the Army*, 769 F.2d 237 (4th Cir. 1985) (determination by Civil Service Commission did not preclude ADEA suit).

In any event, by giving grievants the right to opt out of agency proceedings that last longer than 60 days, Congress clearly expressed an intent to give ADEA grievants, rather than their employers, the right to have their claims decided in a federal court. It is unlikely that Congress intended to deny this right to grievants whose agency proceedings concluded sooner, albeit unfavorably.

Contrary to the Eighth Circuit's view, a holding denying preclusive effect does not reduce agency proceedings to merely "an opportunity for the [grievant] to test his case." *Stillians*, 843 F.2d at 282. "Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a * * * trial *de novo*. See Fed. Rule Evid. 803(8)(C). * * * Moreover, it can be expected that, in light of the prior administrative proceedings, many potential issues can be eliminated by stipulation * * *." *Chandler*, 425 U.S. at 863 n.39. In addition, grievants who lose in the state agency—even if not pleased—may accept the outcome and forego the time and expense of further litigation. Such decisions may well turn on the quality of the administrative proceedings.[15] Under the court of appeals' holding, States retain an incentive to afford grievants an adequate opportunity to assert their age discrimination claims, and grievants retain an incentive to avail themselves of this opportunity.[16] In any

[15] The court of appeals did not reach the issue whether DHR's proceedings satisfied the requirements for administrative preclusion and provided respondent due process. See *Elliott*, 478 U.S. at 797-798. In accordance with *Elliott*, this issue should be left for remand if the court of appeals' decision is reversed. *Id.* at 799 n.8.

[16] A contrary holding would give grievants who are in doubt as to the adequacy of administrative proceedings a powerful incentive to file ADEA actions on the sixtieth day after commencement of the proceedings. See 29 U.S.C. 633(b). This would frustrate Congress's intent to encourage full use of state remedies to resolve age discrimination claims. See *Oscar Mayer*, 441 U.S. at 756.

event, such considerations go to the wisdom of not according unreviewed agency findings preclusive effect, a policy choice that is entrusted to Congress. For the reasons set forth above, we think it clear that Congress has decided that such findings should not enjoy preclusive effect in ADEA suits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI
FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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* *Counsel of Record*

PETITION FOR WRIT OF CERTIORARI FILED MAY 30, 1990
CERTIORARI GRANTED JANUARY 7, 1991

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DOCKET ENTRIES

SOLIMINO

-v-

ASTORIA FEDERAL SAVINGS AND LOAN ASSOC

CV-85-0555

DATE	NR.	PROCEEDINGS
2/21/85	1	Complaint filed. Summons issued. cb
2/26/85	2	Summons returned filed and executed. cb
3/14/85	3	Deft's ANSWER. Filed cb
8-8	–	Before MAC, J-Case Called. COunsel for all side present. Status conf held. Next conf set for 10-22-86, (ent'd 8-11-86 ld
10-10	4	Pltf Notice of Appearance, filed. (ent'd 10-10-86 ld
10-17	5	Pltf Notice for Production of Documents and things, filed. (ent'd 10-17-86 ld
10-22	–	Before MAc, J-Case Called. Counsel for all side present. Status conf held. Next conf 11-24-86. (ent'd 10-23-86 ld
11-24	–	Before MAc, J-Case Called. Counsel for all side present. Status conf held. Next conf set for 1-15-87. deft to turn over document by 12-15-86, filed.
1-12	6	Notice of Oral Deposition of Pltf Angelo J. Solimino, filed. (ent'd 1-21-87 ld
1-12	7	Affidavit of Service (Elise B. Silverman, filed. (ent'd 1-21-86 ld

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* All typographical errors appear in the original.

1-26	8	Pltf's Cross-Notice of Oral Deposition of Henry Drewitz, on 3-19-87 @ 11:00 a.m. filed. (ent'd 1-26-87 ld
2-25	—	Before MAC, j-Case Called. Counsel for all side present. Status conf held. Next conf set for 3-24-87. (ent'd 2-25-87 ld
4-30	9	Deft's Motion to Compel Discovery and Certification of Good Faith Effort to Obtain Discovery Responses, filed. (ent'd 5-4-87 ld
4-30	10	Deft's Memo of Law in Support of its Motion to Compel Discovery. filed (ent'd 5-4-87 ld
6-5	11	Ltf dtd 5-1-87 from Michael S. Cecere to Mr. Gentile pre-trial conf schedule for 5-5-87 has been adjourned. conf reschedule for 5-10-87 @ 10:00 a.m. filed. (emt'd 6-5-87 ld
6-5	12	Ltr dtd 5-21-87 from Joseph J. Gentile to MAC, requesting with the court permission to supply a proper order, regarding the production of said documents, filed. (see order for more detail) ld
6-8	13	Pltf's Responses to Document Demand, filed. (ent'd 6-11-87 ld
6-8	14	Transcript dtd 11-29-87 @ 2:00 a.m. filed. (ent'd 6-8-87 ld
6-3	—	Before MAC, J-Case Called. Counsel for both parties present. Motion argued. Motion granted. ld

6-23	15	Ltr dtd 6-5-87 (unsigned) from paul J. siegel to MAC, requesting a settlement in this case, if settlement is not negotiated, we will appear next before the court on 9-16-87 @ 10:00 a.m. filed. (ent'd 6-23-87
6-23	16	Ltr dtd 6-9-87 from Joseph J. Gentile to MAC regarding Mr. Siegel's recent statement, on 6-5-87, filed. (ent'd 6-23-87 ld
9-23	17	Deft's Supplemental Response to Request #7 of Pltf's Notice to Produce Documents and Things, filed. (ent'd 9-23-87 ld
1987		
11-3	18	Ltr dtd 10-24-87 from Joseph J. Gentile to MAC, regarding enclosed letter to Paul J. Siegel advising him and his law firm of intention to have them disqualified from this case, filed. (see ltr for more detail) ld
11-6	—	Before MAC, J-Case CAlled. Counsel for deft not present. Status conf set for 11-13-87. ld
11-13	—	Before MAC, J-Case Called. Counsel for all sides present. Status conf held. Next conf set for 1-18-88 for motion. ld
1-11	19	Pltf's Motion to take the Deposition of Paul J. Siegel, Deft's Counsel, filed. (ent'd 1-11-88 ld
1-11	20	Pltf's Memo of Law in Support of Motion to Take Deposition of Paul J. Siegel, Deft's Counsel. (ent'd 1-11-88 ld
1-11	21	Memo of Law in Support of Motion to Take Deposition Deft's Counsel, (ent'd 1-11-88 ld

2-11	22	Memo of Law in Opposition to Pltf's Motion to take the Deposition of Paul J. Siegel Deft's Counsel, filed. (ent'd 2-16-88 ld
2-11	23	Affidavit of Anthony H. Atlas in Opposition to Pltf's Motion to Take the Deposition to Paul J. Siegel, Deft's Counsel, filed. (ent'd 2-16-88. ld
2-16	24	Affidavit of Service of Shirley Gibbs, filed. (ent'd 2-16-88 ld
2-18	–	Before MAC, J-Case Called. Counsel for both parties present. Motion argued. Motion denied. Next conf set for 9-22-88. (ent'd 2-19-88 ld
9-22	–	Before MAC, J-Case CAlled. Counsel for all sides present. Status conf held. Next status conf scheduled for 12-8. ld
12-8	25	BEFORE MAC, J-Case Called. Counsel for all sides present. Status conf held. Next status conf scheduled for 2-9-89. ld
1989		
2-9	–	BEFORE MAC-Case called. Counsel for all sides present. Status conf. held. Motion to be filed by 2-23-89. Motion returnable on 3-16-89. mamc
2-23	26	NOTICE of MOTION for SUMMARY JUDGMENT and DEFT'S STATEMENT of MATERIAL FACTS not in DISPUTE ret on 3-16-89 ¶ 10:30 a.m. filed. (ent'd 2-24-89) ld
2-23	27	MEMO of LAW in SUPPORT of DEFT'S MOTION for SUMMARY JUDGMENT, filed. (ent'd 2-23-89) ld

2-23	28	MOVING AFFIDAVIT of ANTHONY H. ATLAS in SUPPORT of DEFT'S MOTION for DEFT'S MOTION for SUMMARY JUDGMENT, filed. (ent'd 2-24-89) ld
2-24	29	EXHIBITS to the Moving AFFIDAVIT of ANTHONY H. ATLAS, filed. (ent'd 2-24-89) LD
3-2	30	LTR dtd 2-23-89 from Sara J. Herrin to MAC re: regarding courtesy copy of deft's appears in support of its motion for summary judgment not enclosed, filed. (ent'd 3-2-89) ld
3-13	31	Pltf's Opposition to Motion for Summary Judgment filed/w Affidavit of Pltf Angelo J. Silimino, in Opposition to Motion for Summary Judgment, filed. (ent'd 3-13-89) ld
3-13	32	MEMO of Law in Opposition to Deft's Motion for Summary Judgment, filed. (ent'd 3-13-89) ld
3/16	33	Notification of case reassignment by random selection to J. Glasser filed. c/m (ent'd 3/16/89) LL
3/23	34	By Glasser, J., Order dated 3/22/89 that parties are directed to appear for a status conference on 4/11/89 at 4:30PM. CM (ent'd 3/23/89). eg
3/16*	35	Deft's Reply Memo of Law to pltff's opposition to motion for summary judgment, filed. (ent'd. 4/4/89). eg

4/11	–	Before Glasser, J., Case called for conference. Counsel for pltff Mr. Gentile present. Counsel for deft Mr. Atlas present. This case was reassigned to Judge Glasser, with a motion for summary judgment pending. The motion will be heard on 5/19/89 at 9:30AM. eg
5/3	36	Pltff's Rule 3(g) Statement filed. (ent'd. 5/4/89). eg
5/19	–	Before Glasser, J., case called. Only Joseph Gentile present. Motion for summary judgment submitted. eg
6/2	37	By ILG MEMORANDUM AND ORDER dtd 5/31/89 defts motion for summary judgment is granted, filed. ent 6/2/89 vv c/m
6/5	38	JUDGMENT dated 6/2/89 that pltff take nothing of deft; & deft's motion for summary judgment is granted on the ground that pltff is administratively estopped from proving this case. CM (ent'd. 6/5/89). eg
6/28	39	****NOTICE OF APPEAL filed. (Pltff/Appellant) from the judgment and order ent'd in this action on 6/2/89. C of A docket fee paid/receipt #110947. NOA served by Clerk. C of A notified. 6/28/89 aoh
7/12	40	Scheduling order from the C of A dated 7/11/89 filed. District court record to be filed by 8/3/89; appellant's brief/appendix by 8/10/89; appellee's brief by 9/7/89; argument to be heard the week of 9/25/89 CofA #89-7639. 7/18/89 aoh
7/25	41	Letter dated 7/20/89 from Anthony Atlas to Mr. Heinemann re: change in the listing of deft's attorney of record. (ent'd. 7/27/89). eg

8/29	–	RECORD certified & sent to C of A. Ackn requested. aoh
9/11	42	Ackn rec'd from C of A for receipt of record on appeal, filed. aoh

SUMMONS DATED FEBRUARY 21, 1985

SUMMONS IN A CIVIL ACTION

United States District Court	District E.D.N.Y.
Angelo J. Solimino,	DOCKET NO.
	COSTANTINO, J.
Plaintiff,	TO: (NAME AND ADDRESS OF DEFENDANT)
v.	Astoria Federal Savings and
Astoria Federal Savings	Loan Association
and Loan Association,	37-16 30th Ave.
Defendant.	Long Island City, N.Y.

YOU ARE HEREBY SUMMONED and required to serve upon

PLAINTIFF'S PRO SE (NAME AND ADDRESS)

Angelo J. Solimino
35 Ava Drive
Syosset, N.Y. 11791

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK ROBERT C. HEINEMANN

(BY) DEPUTY CLERK /s/Steven B. Sheinwald

DATE 2-21-85

COMPLAINT DATED FEBRUARY 20, 1985

CV-85-0555

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	Civ. No.
Plaintiff,	:	COMPLAINT
-against-	:	Plaintiff Demands
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	Trial by Jury
Defendant.	:	

Plaintiff complains of the defendant and respectfully alleges as follows:

1. This action arises under the provisions of Section 4(a)(1) and 4(a)(2) of the Age Discrimination in Employment Act (ADEA) (29 USC Section 623(a)(1) and (2), and Section 7(b) of the ADEA (29 USC Section 626(b) and Section 16(b) of the Fair Labor Standards Act (FLSA) (29 USC Section 216(b)).

2. Jurisdiction of this action is conferred upon this Court by Section 7(b) and 7(c) of the ADEA (29 USC Section 626 (b) and (c)) and Section 16(b) of the FLSA (29 USC Section 216 (b), as amended (29 USC Section 201 *et seq.*).

3. ANGELO J. SOLIMINO, plaintiff herein, is a resident of the County of Nassau and State of New York, and resides at 35 Ava Drive, Syosset, New York 11791.

4. The defendant, ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, is a savings and loan association, organized and existing under the laws of the United States

of America, having its office and principal place of business at 37-16 30th Avenue, Long Island City, County of Queens and State of New York.

5. The defendant was, and is, engaged in commerce within the meaning of the ADEA, and was and is engaged in an industry affecting commerce as defined in Section 11(h) of said ADEA (29 USC Section 630(h)).

6. At all relevant times, the defendant has been engaged in an industry affecting commerce, as aforesaid, and has employed 20 or more employees for each working day in each of 20 or more calendar weeks in the preceding calendar year, and defendant was, and is, therefore, an employer within the meaning of Section 11(b) of the ADEA (29 USC Section 630(b)).

7. More than 60 days prior to instituting this action, plaintiff timely filed a complaint and/or charges with the Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights, and the EEOC and the Division of Human Rights unsuccessfully attempted to eliminate such discriminatory practices complained of, and attempted but failed to effect any voluntary compliance with the requirements of the ADEA on the part of the defendant, through methods of conciliation, conference and persuasion.

8. The date of birth of the plaintiff is December 4th, 1918; and he entered the employ of the defendant on October 4th, 1945.

9. Beginning after the plaintiff attained the age of 56 years, the defendant began to discriminate against him with respect to his compensation and privileges of employment.

10. This discrimination was commenced despite the fact that the plaintiff had contributed greatly, and was still contributing greatly to the business and financial success of his employer, as an officer and as a public relations man in the mortgage origination department.

11. This discrimination was commenced and was continued through a pattern of denying the plaintiff his rightful increases

in salary, and his rightful increases in rank or promotions, while at the same time, increasing the salaries and job positions of many other employees, most of whom were lesser in ability and all of whom were much younger than the plaintiff, both in terms of age and seniority.

12. On March 5th, 1982, the defendant wilfully terminated the plaintiff's employment because of his age.

13. As a result of the defendant's wilful termination of his employment, and wilful discrimination against him, all because of his age, in violation of the ADEA, as aforesaid, plaintiff has suffered damages and will continue to suffer damages, including, but not limited to, lost wages, lost salary increases, promotions that were unjustly denied him, valuable fringe benefits, higher pension benefits and other job-related benefits, so that there is due and owing to plaintiff as of this time, the sum of Two Hundred and Forty Thousand ($240,000) Dollars.

WHEREFORE, plaintiff prays as follows:

1. That the Court issue a mandatory injunction directing the defendant to forthwith employ the plaintiff in the position of Vice-President in the Mortgage Origination Department, at a salary commensurate with the salaries of other Vice-Presidents in other departments who have equivalent rank and seniority;

2. That this Court award plaintiff the sum of Two Hundred and Forty Thousand ($240,000) Dollars, for the loss of wages, pension benefits and other benefits he has suffered to this date, together with the additional sum of Two Hundred and Fifty ($250) Dollars for each day that elapses until plaintiff is employed by defendant;

3. That this Court award plaintiff the costs of this action, together with liquidated damages as provided by law, and in the event that plaintiff shall later have legal representation herein, the reasonable attorneys' fees thereof;

4. That this Court grant plaintiff such other and further relief as may be just and equitable in the premises.

Dated: Syosset, N.Y.
February 20th, 1985

ANGELO J. SOLIMINO,
appearing pro se
35 Ava Drive, Syosset, N.Y. 11791
(516) 921-3314

ANSWER DATED MARCH 11, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555
Plaintiff,	:	Judge Costantino
-against-	:	
	:	ANSWER
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	
Defendant.	:	

Defendant, by its attorneys, Jackson, Lewis, Schnitzler & Krupman, for its answer to the complaint herein respectfully states as follows:

1. Denies each and every allegation contained in paragraph "1" thereof, except admits that this suit has been brought purportedly under the statutes enumerated therein.

2. Denies each and every allegation contained in paragraph "2" thereof, except admits Plaintiff alleges that jurisdiction is conferred under the statutes enumerated therein.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" thereof.

4. Admits the allegations contained in paragraph "4" thereof.

5. Admits the allegations contained in paragraph "5" thereof.

6. Admits the allegations contained in paragraph "6" thereof.

7. Denies each and every allegation contained in paragraph "7" thereof, except admits that a complaint was filed with the Equal Employment Opportunity Commission and the New York State Division of Human Rights more than 60 days prior to instituting this action and affirmatively avers that said complaint was dismissed by the State Division based upon the finding that there was no probable cause to believe Plaintiff's allegations of age discrimination and that said dismissal was affirmed on appeal by the New York Human Rights Appeal Board.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "8" thereof, except admits that Plaintiff began employment with Defendant on or about October 4, 1945.

9. Denies each and every allegation contained in paragraph "9" thereof.

10. Denies each and every allegation contained in paragraph "10" thereof.

11. Denies each and every allegation contained in paragraph "11" thereof.

12. Denies each and every allegation contained in paragraph "12" thereof.

13. Denies each and every allegation contained in paragraph "13" thereof.

FOR A FIRST DEFENSE

14. The complaint fails to state a claim upon which relief may be granted.

FOR A SECOND DEFENSE

15. Plaintiff's claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*, is barred by the applicable statute of limitations.

FOR A THIRD DEFENSE

16. Plaintiff has failed to satisfy conditions precedent and/or jurisdictional requisites to suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*

FOR A FOURTH DEFENSE

17. Each and every action of Defendant which is the subject of the complaint was taken for legitimate, non-discriminatory business reasons only.

FOR A FIFTH DEFENSE

18. Defendant has not violated any rights which may be secured to Plaintiff under federal law.

FOR A SIXTH DEFENSE

19. At all relevant times herein, Defendant acted in good faith and in full compliance with the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*

FOR A SEVENTH DEFENSE

20. Plaintiff voluntarily terminated his employment with Defendant.

WHEREFORE, Defendant respectfully requests that judgment be entered:

1. dismissing the complaint in its entirety;

2. ing each and every claim and demand for relief contained therein;

3. awarding Defendant costs and reasonable attorneys' fees; and

4. granting Defendant such other and further relief as the Court deems proper under the circumstances.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, NY 10016
(212) 697-8200

By: /s/Michael S. Cecere
Michael S. Cecere

Attorneys for Defendant

Dated: March 11, 1985
New York, NY

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555
Plaintiff,	:	Judge Costantino
-against-	:	
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	CERTIFICATE OF SERVICE
Defendant.	:	

The undersigned hereby certifies that a true and correct copy of Defendant's Answer was served on Angelo J. Solimino, by mailing said copy, postage prepaid, to him at his home at 35 Ava Drive, Syosset, New York 11791, this 11th day of March, 1985.

/s/Michael S. Cecere
Michael S. Cecere

Dated: March 11, 1985
New York, NY

NOTICE OF MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 23, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555 (MAC)
Plaintiff,	:	
-against-	:	
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	**NOTICE OF MOTION FOR SUMMARY JUDGMENT**
Defendant.	:	

SIR:

PLEASE TAKE NOTICE that, upon the annexed Moving Affidavit of Anthony H. Atlas, duly sworn to February 23, 1989 and the exhibits submitted therewith and upon the pleadings herein, Defendant Astoria Federal Savings and Loan Association will move this Court, at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on the 16th day of March, 1989 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment in Defendant's favor and dismissing the Complaint herein and awarding Defendant costs, attorneys fees and such other relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Civil Rule 3(g), a Statement of Material Facts, as to which Defendant contends there is no genuine issue, is annexed hereto.

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, New York 10016
(212) 697-8200

By: /s/Anthony H. Atlas
Anthony H. Atlas
Paul J.Siegel
Sara J. Herrin

ATTORNEYS FOR DEFENDANT

Dated: New York, New York
February 23, 1989

To: JOSEPH J. GENTILE, Esq.
Attorney for Plaintiff
30-15 30th Avenue
P.O. Box 2175
Long Island City, N.Y. 11102

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE FEBRUARY 23, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO,	:	CV-85-0555 (MAC)
Plaintiff,	:	
-against-	:	**DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**
ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,	:	
Defendant.	:	

Pursuant to Local Court Rule 3(g), Defendant Astoria Federal Savings and Loan Association hereby submits, in support of its motion for summary judgment, this statement of material facts not in dispute:

1. Plaintiff Angelo J. Solimino ("Plaintiff") was employed by Defendant Astoria Federal Savings and Loan Association ("Astoria") in various capacities from on or about October 4, 1945 to March 5, 1982. At the time of the termination of his employment, Plaintiff was Vice President of the Mortgage Origination Department. (*Exhibit 3* to moving affidavit of Anthony H. Atlas, Solimino depo. at 32).[1]

2. On February 18, 1982, Astoria's President, Henry Drewitz, met with Planitiff (Solimino depo. at 111).

3. At that meeting, Mr. Drewitz told Plaintiff that the Board of Directors had decided to terminate Plaintiff's employment

[1] Hereafter cited simply as "Solimino depo. at ____." The deposition was taken on December 1, 1988.

and offer him early retirement due to the size of financial losses the previous year (1981) and projected losses for 1982 (Solimino depo. at 112).

4. At the said meeting of February 18, 1982, Plaintiff asked to be allowed to stay on for another 30 to 60 days, but Mr. Drewitz refused this request. Mr. Drewitz advised Plaintiff that his last day of work would be March 5, 1982. (Solimino depo. at 112, 115).

5. When, on March 4, 1982, Rhoda Baisi, Director of Personnel of Defendant, asked Plaintiff to sign a letter concerning supplemental pension benefits, Plaintiff knew his employment by Defendant had already been terminated. (Solimino depo. at 112).

6. On March 18, 1982, Plaintiff filed a charge with the New York State Division of Human Rights ("the Division") and the United States Equal Employment Opportunity Commission ("EEOC"). In that charge, Plaintiff claimed that he had been discriminated against because of his age when his employment was terminated.

7. Plaintiff also claimed that Defendant denied him salary increases and promotions from 1974 to 1981. (Solimino depo. at 129-135).

8. The charge stated, with respect to the date the alleged discriminatory termination occurred:

> Date most recent or continuing discrimination took place (month, day, and year) *February 18, 1982.*
>
> I have been denied monetary compensation and/or other recognition compensorate (sic) to my work performance and title as a staff officer. *I have been given a notice of termination on February 18, 1982* and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective March 5, 1982.

(*Exhibit 4* to moving affidavit of Anthony H. Atlas; emphasis added).[2]

9. Plaintiff was represented by an attorney, Joseph J. Gentile, Esq., throughout the Division's proceedings. (Solimino depo. at 126).

10. As part of its investigation of Plaintiff's charge, the Division held an investigative hearing on November 29, 1982. At that investigative hearing, sworn testimony was taken from Plaintiff and Defendant's witnesses. Plaintiff had the opportunity to and did question Defendant's witnesses. (*See Exhibit 5* to the moving affidavit of Anthony H. Atlas).

11. On or about January 25, 1983, the Division issued a determination that no probable cause existed to believe that the discrimination alleged had occurred. (*Exhibit 6* to the moving affidavit of Anthony H. Atlas).

12. On about January 31, 1983 Plaintiff appealed that decision to the New York State Human Rights Appeal Board. (*Exhibit 7* to the moving affidavit of Anthony H. Atlas).

13. On or about May 30, 1984 the Board affirmed the Division's determination. (*Exhibit 8* to the moving affidavit of Anthony H. Atlas; Solimino depo. at 99).

14. On or about August 3, 1983, Plaintiff commenced an action in the Supreme Court, New York County (Index No. 22074/83) against four officers of Defendant, two functionaries of the Division, Jackson, Lewis, Schnitzler & Krupman and Paul J. Siegel, then an associate of that firm. (Solimino depo. at 96-97, 127; *Exhibit 9* to the moving affidavit of Anthony H. Atlas).

15. Plaintiff was represented by Mr. Gentile in that action. (Solimino depo. at 127).

---

[2] Also marked Exhibit "K" for identification at the Solimino deposition.

16. In the said action, Plaintiff asserted causes of action relating to alleged improprieties arising out of the proceeding before the Division. (*Exhibit 9* to the moving affidavit of Anthony H. Atlas).

17. The defendants in that action moved to dismiss the Complaint.

18. On or about March 6, 1984, the Supreme Court, Special Term, granted the motion to dismiss all defendants except the Division's functionaries. (*Exhibit 10* to the moving affidavit of Anthony H. Atlas).

19. An order of dismissal was entered on April 16, 1984. (*Exhibit 11* to the moving affidavit of Anthony H. Atlas).

20. On April 12, 1984, Special Term granted the Division officials' motion to dismiss; an order of dismissal was entered on May 10, 1984. (*Exhibits 12 and 13* to the moving affidavit of Anthony H. Atlas).

21. Plaintiff appealed the said orders of dismissal to the Appellate Division of the Supreme Court, First Department. That Court affirmed the order of Special Term without opinion on or about May 7, 1985. (*Exhibit 14* to the moving affidavit of Anthony H. Atlas).

22. Plaintiff did not appeal or seek leave to appeal to the New York State Court of Appeals.

23. On *February 21, 1985*, Plaintiff filed a complaint alleging that Defendant had violated the Age Discrimination in Employment Act. (*Exhibit 1* to the moving affidavit of Anthony H. Atlas).

24. The complaint in the instant action was prepared by Mr. Gentile but was signed and filed by Plaintiff, *pro se*, since, at that time, Mr. Gentile was not admitted to practice in the

United States District court for the Eastern District of New York. (Solimino depo. at 127-128).

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, New York 10016
(212) 697-8200

By: /s/Anthony H. Atlas
Anthony H. Atlas
Paul J. Siegel
Sara J. Herrin

ATTORNEYS FOR DEFENDANT

Dated: February 23, 1989
New York, New York

MOVING AFFIDAVIT OF ANTHONY H. ATLAS IN SUPPORT OF MOTION DATED FEBRUARY 23, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGELO J. SOLIMINO, Plaintiff, -against- ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant.	CV-85-0555 (MAC) **MOVING AFFIDAVIT OF ANTHONY H. ATLAS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ANTHONY H. ATLAS, being duly sworn, deposes and says:

1. I am Counsel to the firm of Jackson, Lewis, Schnitzler & Krupman, attorneys for Astoria Federal Savings and Loan Association, the Defendant herein, and as such, I am familiar with this case. I make this affidavit in support of Defendant's motion for summary judgment.

2. On February 21, 1985, Plaintiff commenced this action by filing a complaint alleging that Defendant willfully violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*,: (1) by denying Plaintiff salary increases and promotions from 1974 through 1981, and (2) by terminating his employment on March 5, 1982. (A copy of the complaint is submitted herewith as *Exhibit 1*).

3. A timely answer was served and filed on March 11, 1985. (A copy of the answer is submitted herewith as *Exhibit 2*). Defendant's answer asserted various affirmative defenses including allegations that Plaintiff's claims are barred by the statute of limitations and also are procedurally precluded.

4. On December 1, 1988, Defendant commenced the deposition of Plaintiff. Relevant portions of the transcript of that day's deposition, cited in Defendant's memorandum of law and statement of material facts, are submitted herewith as *Exhibit 3* and are hereafter cited as "Solimino depo at ____".

5. On March 18, 1982, Plaintiff filed a charge with the New York State Division of Human Rights and the United States Equal Employment Opportunity Commission that he had been discriminated against by reason of his age in violation of the Age Discrimination in Employment Act when he was discharged from his employment. At the time, he was a vice president of Defendant in its mortgage origination department. In addition, Plaintiff alleged that he was discriminated against when he was denied salary increases and promotions during the period 1974-1981. A copy of the charge (identified at the deposition as Exhibit "K") is submitted herewith as *Exhibit 4*.

6. In his charge alleging age discrimination, Plaintiff stated, in response to the question printed on the form as to the date the alleged discrimination took place:

> Date Most Recent Or Continuing Discrimination Took Place (Month, day and year) *February 18, 1982*.

And again, in the narrative portion of the charge, Plaintiff stated the nature and date of alleged discrimination:

> I have been denied monetary compensation and/or other recognition compensorate (sic) to my work performance and title as a staff officer. *I have been given a notice of termination on February 18, 1982* and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective on March 5, 1982.

(*Exhibit 4*; emphasis added)

7. At his deposition, Plaintiff was asked about this. He not only re-affirmed the statements in his charge (Solimino depo. at 85-86; 117-118), but affirmatively admitted that he was notified on *February 18, 1982* that his employment would be terminated on March 5, 1982. (Solimino depo. at 111).

8. Plaintiff further testified at his deposition that he was represented by an attorney throughout the Division's proceedings. (Solimino depo. at 126).

9. As part of its investigation of Plaintiff's charge, the Division held an investigative hearing on November 29, 1982. At that hearing, sworn testimony was taken from Plaintiff and Defendant's witnesses. Plaintiff had the opportunity to question Defendant's witnesses. (A copy of the transcript of the hearing is submitted herewith as *Exhibit 5*. This transcript is submitted to show that the Plaintiff had a full and fair opportunity to litigate his claim of age discrimination, and not necessarily for the truth of the statements made therein.)

10. On or about January 25, 1983, the Division issued its determination that no probable cause existed to believe that the alleged discrimination had occurred. A copy of the determination is submitted herewith as *Exhibit 6*.

11. On or about January 31, 1983, Plaintiff appealed that decision to the New York State Human Rights Appeal Board (*Exhibit 7* submitted herewith). The Board affirmed the determination of the Division on or about May 30, 1984 (*Exhibit 8* submitted herewith). Although Plaintiff had the right to do so, he did not further appeal to the Appellate Division of the State Supreme Court.

12. On or about August 3, 1983, while the Human Rights Appeal Board appeal was still pending, Plaintiff commenced an action in the Supreme Court, New York County (Index No. 22074/83) against four officers of Defendant, two functionaries of the Division, Jackson, Lewis, Schnitzler & Krupman and Paul J. Siegel, then an associate and now a member of Jackson, Lewis, Schnitzler & Krupman (Solimino depo. at 96-97, 127). A copy of the complaint is submitted herewith as *Exhibit 9*.

13. In that action, Plaintiff asserted causes of action for "conspiracy" and libel arising out of and attacking the conduct of the Division proceeding (*Exhibit 9*). Plaintiff was represented by Mr. Gentile in this action. In effect, Plaintiff sought to have the Division's action judicially reviewed, while by-passing the statutory procedure.

14. The defendants in the state court action moved to dismiss the entire Complaint. On or about March 6, 1984, Special Term granted the motion to dismiss of all defendants except the Division functionaries (*Exhibit 10* submitted herewith). An order of dismissal was entered on April 16, 1984 (*Exhibit 11* submitted herewith). On April 12, 1984, Special Term granted the Division employees' motion to dismiss, (*Exhibit 12* submitted herewith). An order of dismissal was entered on May 10, 1984 (*Exhibit 13* submitted herewith).

15. Plaintiff appealed the dismissal to the Appellate Division, First Department. That court affirmed the order without opinion on or about May 7, 1985 (*Exhibit 14* submitted herewith).

16. On February 21, 1985, Plaintiff commenced the within action claiming age discrimination. Joseph Gentile, Plaintiff's attorney on all other aspects of this matter drafted the complaint in this action, although Plaintiff filed the complaint, acting *pro se*, since Mr. Gentile was not then admitted to practice before this Court. (Solimino depo. at 127-128). Mr. Gentile was subsequently admitted to practice before this Court and he has filed his notice of appearance as Plaintiff's counsel.

17. The undisputed material facts show that Plaintiff's claims are barred by the statute of limitations. The date on which the *last* alleged discriminatory act occurred with respect to the termination of his employment was *February 18, 1982*. This action, filed on *February 21, 1985*, was commenced *three years and three days* from the date the Plaintiff's claims accrued. Thus, Plaintiff's claims here are untimely. The claims with respect to salary and promotions are well beyond the time-bar.

18. The undisputed material facts also show that Plaintiff's Claims are procedurally precluded. The Division was acting in a judicial capacity with respect to Plaintiff's claims. The issues of age discrimination, resolved by the Division, are identical to the issues in this action. The state administrative and judicial proceedings offered Plaintiff a full and fair opportunity to litigate his claims of age discrimination. Such administrative determinations are entitled to preclusive effect in the courts of New York. Plaintiff, moreover, sought to give himself an additional opportunity to litigate the issues when he brought the Supreme Court action. The purpose of it was clear: to reopen or reverse the Division proceedings and its determination. Although the maneuver failed, the opportunity was present. Plaintiff is thus procedurally precluded from again raising the issues.

19. For these reasons, Defendant's motion for summary judgment should be granted and the Complaint dismissed in its entirety and awarding Defendant costs, attorneys fees and such other relief as to the Court may seem just and proper.

/s/Anthony H. Atlas
Anthony H. Atlas

Sworn to before me this
23rd day of February, 1989

/s/Esther E. Elder
Notary Public

Esther E. Elder
Notary Public State of New York
No. 24-4601297
Qualified in Kings County
Certificate filed in New York County
Commission Expires October 31, 1990

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT:

EXHIBIT 4 - CHARGE OF DISCRIMINATION

BY OMB 8-0011 Expires 12/31/83

CHARGE OF DISCRIMINATION

CHARGE NUMBER(S) (AGENCY USE ONLY) ☐ 021821330

IMPORTANT: This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.

Equal Employment Opportunity Commission
NYS Division of Human Rights

NAME (Indicate Mr., Ms. or Mrs.)	HOME TELEPHONE NUMBER (include area code)
Mr. Angelo J. Solimino	(516) 921-3314
STREET ADDRESS 35 Ava Drive	
CITY, STATE AND ZIP CODE Syosset, New York 11791	COUNTY

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (if more than one list below).

NAME	TELEPHONE NUMBER (Include area code)
Astoria Federal Savings and Loan	
STREET ADDRESS 37-16 30th Avenue	CITY, STATE, AND ZIP CODE L.I.C., New York 11103

NAME TELEPHONE NUMBER (Include area code)

STREET ADDRESS CITY, STATE, AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☒ OTHER (Specify) AGE

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)
February 18, 1982

THE PARTICULARS ARE:

Date of Birth: December 4, 1918

I have been denied monetary compensation and/or other recognition compensorate to my work performance and title as a staff officer. I have been given a notice of termination on February 18, 1982 and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective on March 5, 1982. I was hired October 4, 1945 as a teller and promoted several times to the Vice President title in or about 1962.

The reason given by Henry Drewitz, President, for the termination was the mortgage industry is very slow, and that two Vice Presidents were no longer needed.

I believe I have been discriminated against because of my age (63 yrs.) for the following reasons:

1. I was the oldest Officer out of approximately 30 officers and/or assistant officers employed by the respondent.

2. My duties and functions as Vice President of the Mortgage Origination Department were absorbed by younger staff officers who I trained.

3. Upon belief, had I been a younger staff officer I would not have been forced into early retirement.

Deft. Ex. K.

I will advise the agency if I change my address or telephone number and I will cooperate fully with it in the processing of my charge in accordance with its procedures.

Received March 18, 1982, Intake E.E.O.C. - N.Y.D.O.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 3/18/82
CHARGING PARTY (Signature) /s/ Angelo J. Solimino

EEOC FORM 5A MAR 79

PREVIOUS EDITIONS OF ALL EEOC FORM 5'S ARE OBSOLETE AND MUST NOT BE USED

RESPONDENT'S COPY

EXHIBIT 5 - TRANSCRIPT OF HEARING DATED NOVEMBER 29, 1982

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

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STATE DIVISION OF HUMAN RIGHTS
ON THE COMPLAINT OF:

ANGELO J. SOLIMINO,

Complainant,

– against –

ASTORIA FEDERAL SAVINGS AND LOAN,

Respondent.

----------X

89-02 Sutphin Boulevard
Jamaica, New York

November 29, 1982
2:00 P.M.

INVESTIGATIVE HEARING held at the above mentioned time and place, pursuant to Notice, before a Notary Public of the State of New York.

HARRIET BEIZER ASSOCIATES
"A Verbatim Reporting Service"
70-49 AUSTIN STREET
FOREST HILLS, NEW YORK 11375
544-4199

APPEARANCES:

JOSEPH J. GENTILE, ESQ.
Attorney for Complainant
30-15 30th Avenue
Long Island City, New York 11102

JACKSON, LEWIS, SCHINTZLER & KRUPAN, ESQS.
Attorneys for Respondent
261 Madison Avenue
New York, New York 10016
BY: PAUL J. SIEGEL, ESQ., of Counsel

Also Present:
Annabell Weiner - Human Rights Specialist

Witnesses:
Angelo J. Solimino
Henry Drewitz
Frank M. Beiter
Arnold K. Greenberg
Rhoda Baisi

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ANGELO J. SOLIMINO,
HENRY DREWITZ,
FRANK M. BEITER,
ARNOLD K. GREENBERG,
RHODA BAISI,

the witnesses herein, having been first duly sworn by a Notary Public of the State of New York, testified as follows:

MS. WEINER: The complainant is Angelo J. Solimino. The respondent is Astoria Federal Savings and Loan. "I have been denied monetary compensation and/or other recognition commensurate to my work performance and title as a staff officer. I have been given a notice of termination on February 18th, 1982 and forced into early retirement from my position as Vice President of the Mortgage Originators Department to be effective on March 5th, 1982. I was hired October 4th, 1945 as a Teller and promoted several times to the Vice President title in or about 1962. The reason given by Henry Drewitz, President, for term. ation was the mortgage industry is very slow and that two Vice Presidents were no longer needed. I believe I have been discriminated against because of my age, 63, for the following reasons: 1, I was the oldest officer out of approximately 30 officers and/or assistant officers employed by the respondent; 2, my duties and functions as Vice President of the Mortgage Originators Department were absorbed by younger staffed officers who I trained; 3, upon belief had I been a younger staff officer I would not have been forced into early retirement."

Who will speak first?

MR. SIEGEL: I would think that Mr. Drewitz will explain how this came to pass and the specifics will be explained by those that were specifically involved.

Will you explain how this entire decision was necessary?

MR. DREWITZ: In order to improve the efficiency of our Mortgage Department, I'd had Mr. Greenberg, who is our Senior Vice President, make a thorough analysis of the entire Mortgage Department and he came in with certain conclusions and in keeping with his conclusions and also the fact that the mortgage activity had been diminished because of the high interest rates and the prospect for early renewal of high rate lending, the staff that we had, the executive staff, was not necessary. It was not necessary for us to operate with two Vice Presidents there.

MR. SIEGEL: Why don't you explain the report you did?

MR. GREENBERG: I went into Woodside, which is where our Mortgage Origination Department is, and prior to that I had spoken with several of the people in the Association, the personnel officer, people in other departments, attorneys and so on, to try to get a feel for how is that department running. As Mr. Drewitz described the business was slowing down, but the efficiencies did not seem to be there in the department, so I went through and I looked at most of the job functions, almost all of them, on a broad brush basis. I found that the personnel in Woodside, about 20 I think, something like that, the attitudes ran from apathy, jealousy, lack of respect, bossiness, and it seemed to be a major problem just in the department and in order to do any real work flow analyses and adjustments, I felt that some switches would have to be made in the personnel who were there. Some of the Clerk/Typists I felt were in the wrong areas and some of the officers I felt were doing the wrong type of job.

MS. WEINER: Was that done in any other department?

MR. GREENBERG: No. Just this department.

MR. GENTILE: He is much too general. I would like to know to whom he spoke and also his qualifications for conducting an investigation in a department he knew nothing about.

MS. WEINER: Could we hold that until we hear from everyone?

MR. GENTILE: Yes.

MR. GREENBERG: At the time I started working at the department, there was another fellow there, Joe Salz, who was an Assistant Secretary, I think, and he was basically charged with the responsibility of handling the Clerk/Typists, the lower level people in the department, and he gave me an organization chart and some of the work flows. It seemed as though we had too many people for the type of volume going through there. Previously I mentioned the people were apathetic, some jealous, some bossy. It was a loose situation. That was Joe Salz's responsibility, so my recommendations for the change were

basically to switch Joe out, which we did. We switched him into another department and he was replaced over there and also to remove the building loan function from what Angelo was doing and transfer that to Frank Beiter and his Secretary. It was Angelo and his Secretary, I believe. I don't know if that's what he called her. They were basically handling the building loans and I felt the volume was so low that it could be switched away and Frank and his Secretary could handle that very well. The problem then came down we'd taken away just about all the high powered – that's the wrong word.

MR. SIEGEL: Would you say it was his Vice Presidential duties?

MR. GREENBERG: Basically the job he would have been left with was being performed by, to some degree, some Clerk/Typists also.

MR. SIEGEL: When Mr. Salz was performing that internal personnel function, who had performed that previously and why was it then performed by Mr. Salz?

MR. GREENBERG: I believe Angelo was doing that before Mr. Salz and apparently there were problems then which I had to get involved with that was previous, a year or year and a half before. Apparently it wasn't being done properly, so Joe Salz was given that responsibility.

MR. GENTILE: I first would like to know if there were any complaints made about any of the Clerk/Typists or any other personnel in the Mortgage Department, any complaints made about insubordination or lack of work or insufficiency.

MR. GREENBERG: By who? The public?

MR. GENTILE: Anyone who made any complaints these people were inefficient and not working. When Mr. Solimino was in charge, were there any complaints about personnel?

MR. GREENBERG: I don't know.

MR. GENTILE: You have no knowledge about that?

MR. SIEGEL: This is three years or more.

MR. GENTILE: I want to clarify it. He has no knowledge about what occurred prior to Mr. Salz being there, so he should not make a comment on it.

MS. WEINER: Everything is open right now. Of course, you realize in a charge of discrimination when the investigator has to investigate they have to know what to delete and what to consider.

Who would be the next one?

MR. SIEGEL: What were your recommendations?

MR. GREENBERG: To give the building loan function, which was being performed by Angelo and his Secretary, to primarily Frank's Secretary and I believe she's doing that now. I'm not sure. I haven't gone back there recently. To replace Joe Salz with a Mary Klecar and she would take over the responsibilities for the administrative part of it.

MR. GENTILE: When was that?

MR. GREENBERG: Early part of this year.

MR. GENTILE: Give a date.

MR. GREENBERG: January, February.

MR. GENTILE: You made a report to the Board?

MR. GREENBERG: The date of the Board meeting.

MR. GENTILE: Can somebody supply the Board meeting?

MR. SIEGEL: It was attached.

MR. GENTILE: But there was no date on those papers.

Do you have a date? This was your February, 1982 meeting?

MR. DREWITZ: February 17th.

MR. GENTILE: May I ask another question?

MS. WEINER: Yes, sir.

MR. GENTILE: I notice on these two pages which are unsigned, they contain the same serial number.

Are all your pages separately numbered or are they all with the same number?

MR. SIEGEL: They are consecutively numbered.

MR. GENTILE: Then mine is cut off.

MR. DREWITZ: 40807.

MR. GENTILE: The other one is 08?

MR. DREWITZ: That's correct.

MR. GENTILE: I notice they are not signed. Are they customarily signed at the end?

MR. DREWITZ: Only the last page of the minutes.

MR. GENTILE: This is not the last page?

MR. DREWITZ: No.

MS. WEINER: Let us continue.

MR. SIEGEL: To clear up something, would you be the best person to explain the previous change in supervisory authority when the supervision of the internal department staff was transferred to Mr. Salz or would Frank be?

MR. DREWITZ: Because of what we consider improper supervision of the staff, we gave Joe Salz the title or the authority to supervise all the personnel that was taken away from Mr. Solimino.

MR. SIEGEL: Do you remember when?

MS. BAISI: That was in November of 1981.

MR. GREENBERG: No. November, 1980.

MS. BAISI: November, 1980. I'm sorry.

MR. SIEGEL: You worked with Angelo.

Would you describe his supervisory abilities and limitations and his general work ability and limitations?

MR. GENTILE: Before he does that, I want to say Mr. Beiter might be considered in competition with Mr. Solimino for the job in the Mortgage Department.

MS. WEINER: Accepted.

MR. BEITER: Most of what I have to say is in the evaluations I turned in on Solimino each year. His basic failure as far as I was concerned was an inability to exercise his authority over his subordinates. He's a nice guy and that's how he ran it. Job performance for the most part wasn't bad. The weak part, there was – he did not take to new changes readily. We had a lot of changes in the law in the past six, seven years affecting mortgages. We had to rely more on Mr. Chin, who was his assistant, for directing whatever changes there were. His greatest value to me was as a P.R. man, was as a stand-in between myself and the builders, brokers, lawyers. He did extremely well there. Over all I would say it was a fair evaluation.

MR. SIEGEL: Did Mr. Solimino get to read his evaluations?

MR. BEITER: He was given an opportunity. Most of the time he chose not to read them.

MR. SOLIMINO: Because it had the same thing down there every year. "He refuses to exercise his authority with the girls," which is a dirty rotten lie.

MR. BEITER: I take exception to that.

MS. WEINER: You were given the opportunity to read your evaluations?

MR. SOLIMINO: That's right.

MS. WEINER: It was your prerogative to either agree or not to agree, but you chose not to read them at all?

MR. SOLIMINO: Yes, because it was the same thing every year.

MS. WEINER: I wanted to know whether you were given the opportunity.

MR. SOLIMINO: Yes, I was.

MR. GENTILE: I would like to know whether or not Mr. Beiter as Mortgage Officer was not charged with the overall discipline in his department.

MS. WEINER: You want to answer that?

MR. BEITER: I was charged with overall supervision of the department, yes. Because of the function of my job I had to delegate immediate supervision of the employees to someone else. Particularly toward the end, half my time wasn't spent in the building I worked in. It was spent in the main office.

MR. SIEGEL: Why?

MR. BEITER: My primary function as a member of the Loan Committee, two or four members, authorized members, can hold a meeting and we did daily. Mr. Drewitz and myself were the main participants in that meeting. Because of the overriding importance of his job, those meetings were held in his office most

of the time. Consequently, it meant I had to either pick up the work and go to the main office or report there directly. Approximately half a day or half of every working day was spent in the main office. The other half I did spend back in my office, but by the time you get back and set up the work for processing, answering your phone calls and everything else, there isn't much time left in your day.

MR. SIEGEL: In addition, when you were not in your office, what were Angelo's functions to have been?

MR. BEITER: He was to take my place.

MR. SIEGEL: Did he?

MR. BEITER: Obviously, in the opinion of management, no.

MR. SIEGEL: What was not done when you were not present?

MR. BEITER: Mainly to maintain the discipline and maintain the work flow.

MR. SIEGEL: Would you explain what was and was not done?

MR. BEITER: We've gone though a period of a lot of changes in the law which necessitated a lot of changes in our paperwork, increasing it dramatically. He just didn't get that work flow through on a smooth basis. We have a rough system which does not adapt itself readily to the laws, so it is awkward at best, but still and all it is manageable to some degree.

MR. SIEGEL: As to decision making when you were not present, would you explain if there were any bottlenecks in that?

MR. BEITER: Decisions go back to my original complaint to him. He would defer them until he would get back to the office.

MR. SIEGEL: What kind of decisions were deferred?

MR. BEITER: Anything that came up.

MR. SIEGEL: Give us some examples.

MR. BEITER: I can't think of anything, any particular instance off the top of my head.

MR. GENTILE: Mr. Beiter, weren't you jealous of his prerogatives as Mortgage Officer and very often would not permit him to make decisions?

MR. BEITER: No. No way. That's something I never denied any of my subordinates.

MR. GENTILE: Were there any disciplinary problems with any personnel? Give us some instances. Where was the insubordination?

MR. SIEGEL: Nobody every said there was.

MR. GENTILE: No, Mr. Siegel. Listen to the testimony, sir. There was an allegation that they could not control the personnel.

MR. SIEGEL: And get the work done.

MR. GENTILE: I would like to know what instances. Anyone who didn't do their work is insubordinate. I would like to know where the complaints were.

MR. BEITER: It is a rather broad interpretation of insubordination. I wouldn't call it that or maybe it is, when you come down to it. If some people are capable of doing certain functions and they won't permit themselves to be trained for others or they refuse to go on to others, personal preference or lack of ability—it did happen among some of the Clerks. Some of them did not want to change jobs and resisted any change.

MR. SIEGEL: In addition, isn't the staff reduced now from what it was before in the Clerk/Typist areas? Explain how much smaller it is.

MS. BAISI: We took one Clerk, namely Amy Shields. We had no work for her. We didn't want to fire her or lay her off, so we put her into the Labor Service Department. She was a full-time person.

MR. GENTILE: Was she competent in Mortgage Originations? Could she handle that?

MS. BAISI: Yes.

MR. GENTILE: Was there anyone else?

MR. SIEGEL: She is still speaking.

MR. GENTILE: May I ask her—

MS. WEINER: I told you to please hold any questions you had until the person who was speaking was finished.

MR. GENTILE: I have not cut her off.

MS. WEINER: Answer this question and then please proceed to finish whatever you are going to state.

MS. BAISI: Let me start from the beginning. Mary Klecar, she has an overflow of people and the work has diminished quite a bit. She asked could I use someone or she'll have to lay them off. I said we can certainly use them in another department. I called another department head and he said yes. Unfortunately this other girl left, so in her place we hired a part-timer.

MR. SIEGEL: You had two full-timers. One left, one was transferred to another area outside Mortgage Originations and you replaced the two full-timers with one part-timer.

MR. GENTILE: Who was the other full-timer?

MS. BAISI: Kathy Miller.

MR. GENTILE: Was she competent?

MS. BAISI: Very much so.

MR. GENTILE: Is she working now?

MS. BAISI: She left.

MR. SIEGEL: When did you hire that part-timer?

MS. BAISI: Recently.

MR. SIEGEL: How old is she?

MS. BAISI: 66 years old.

MS. WEINER: I want you to know that even though you have an attorney you are free to speak, Mr. Solimino.

MR. SOLIMINO: I know.

MS. WEINER: Have you completed what you were going to say?

MS. BAISI: Yes.

MR. GENTILE: Can we stay on the same subject or can we ask some questions?

MS. WEINER: Before you ask any questions, stay on the subject and then I am going to ask some. Go ahead.

MR. GENTILE: I will defer to you.

MS. WEINER: If everyone has spoken and this is what you consider the answers to the complaint, the allegations of the complaint, is there anything further that you wish to say before Mr. Gentile has his opportunity to speak and ask questions?

MR. SIEGEL: There was something else. Before we spoke about Ed Price's functions as a fill-in.

MR. GENTILE: I did not hear Price mentioned before.

MR. SIEGEL: Before we got here.

Would you speak about Ed Price and his function?

MR. BEITER: Mr. Price was formerly my assistant. I worked in another department years ago.

MS. WEINER: When you say assistant, was he of the same capacity?

MR. BEITER: I was head of the Mortgage Service Department. I was also a Vice President then. Price was my assistant. At the time when Mr. Drewitz was made President and I became Mortgage Officer, I was removed from that department and given the Origination Department and Mr. Price succeeded me in the other capacity. He happens to be an intelligent and aggressive young man. We were both very close and I relied on him heavily. Because I perceived what I felt at that time was a weakness on Angelo's part to enforce his own authority, I advised Mr. Price that if I wasn't around, because at that time we all worked in the same office, that it would be perfectly alright for him to run both sections, if he would not make a decision, that he should go in my place and make one.

MS. WEINER: Was he considered of higher rank than Mr. Solimino?

MR. BEITER: He wasn't at that time. He was made a Vice President at that time.

MS. WEINER: They were considered equal?

MR. BEITER: He would be slightly higher. He headed up his on section.

MR. GREENBERG: Mr. Price was not.

MR. GENTILE: He was junior to Mr. Solimino?

MR. GREENBERG: That's right.

MR. BEITER: In title.

MR. GREENBERG: In title.

MR. BEITER: At the time he was Assistant Vice President.

MS. WEINER: What I was looking to find out was at the time he was given the back-up authority he had a lower title in fact?

MR. BEITER: I will stand corrected. He had a lower one.

MR. GENTILE: When you came from Mortgage Service and were elevated or promoted to Mortgage Officer that meant you went to Mortgage Origination, is that correct?

MR. BEITER: Yes.

MR. GENTILE: Were you at that time familiar with Mortgage Origination?

MR. BEITER: I was to a degree, yes. I didn't work in it.

MR. GENTILE: Did someone have to help you in Mortgage Origination when you started?

MR. BEITER: Of course, yes. Mr. Solimino did.

MR. GENTILE: Prior to your being Mortgage Officer, who was it?

MR. BEITER: Mr. Drewitz.

MR. GENTILE: He left the Mortgage Department when he became President, is that correct?

MR. BEITER: Yes.

MR. GENTILE: Mr. Drewitz was the most qualified person here to know about Mortgage Origination at that time, isn't that correct?

MR. BEITER: Yes.

MR. GENTILE: Probably still knows a great deal about it?

MR. BEITER: Yes.

MR. SIEGEL: When you had questions, did you go to Angelo after a while or Mr. Drewitz?

MR. BEITER: I would ask Mr. Drewitz.

MR. SIEGEL: The last seven or eight years, did you go to Angelo for your questions?

MR. BEITER: No.

MR. SIEGEL: Why not?

MR. BEITER: You are asking me if I asked questions?

MR. SIEGEL: Asked Angelo questions on how to run the department, mortgages and writing mortgages.

MR. BEITER: As to how our department was running, yes. How things are going on inside and what's affecting them inside, yes, I did, but as far as how to operate the Mortgage Originations Section, no. I would ask him if he had suggestions, changes, if he wanted anything changed.

MS. WEINER: Is that the question?

MR. GENTILE: There are more questions.

MR. SIEGEL: Did he made beneficial suggestions?

MR. BEITER: Not too many, no.

You and I are going to get into an argument.

MS. WEINER: I won't allow any arguments here.

MR. SOLIMINO: How about when you were on the phone and you'd have to get off the phone and run into me and ask me how you should answer the questions they were asking you on the phone? Do you remember that?

MR. BEITER: What do you mean?

MR. SOLIMINO: When you first took over as Mortgage Officer, did you ever have to put down a phone and ask me what you had to say?

MS. WEINER: May I ask what type of questions?

MR. SOLIMINO: Mortgage questions. Mortgage Origination to create loans.

MS. WEINER: Is that clear?

MR. SOLIMINO: Did you ever have to come out and ask me?

MR. BEITER: I can't remember any.

MS. WEINER: How long ago was this?

MR. SOLIMINO: Only about eight years ago. He's a young fellow yet. He shouldn't forget.

MR. SIEGEL: Sarcasm isn't necessary.

MR. SOLIMINO: He should remember.

MR. SIEGEL: Within the last five years has he come to you and asked you the same kind of questions, the last four years?

MR. SOLIMINO: Once in a while.

MR. BEITER: Who taught you when you were brought up? Who helped you if you –

MR. SOLIMINO: It wasn't you.

MS. WEINER: Excuse me one moment. The complaint of the charge of discrimination is not being considered for eight years ago.

MR. SOLIMINO: Yes, it is, because here they're telling me that I was ineffective for eight years. They're telling me I was ineffective for eight years.

MS. WEINER: But you state you were in the position of Vice President, you were no longer needed as Vice President and that's when you filed your complaint.

MR. SOLIMINO: That's right.

MR. GENTILE: That is not accurate. We have no knowledge of whether it is bird, fish or beast. We don't know Mr. Solimino's present status, whether he was discharged, fired, retired or resigned and we would like to have clarification from Mr. Drewitz.

MS. WEINER: We will get to that. The thing is whatever happened eight years ago is really not included into the charge of discrimination that has been filed.

MR. GENTILE: All right.

MS. WEINER: Is that understood? Did you wish to say anything else?

MR. SOLIMINO: No.

MR. SIEGEL: We might as well clarify that point.

Would you explain after the decision was made to eliminate the second Vice President's slot what happened?

MS. WEINER: Before we go into that, are you now answering to a question he wanted asked about what happened?

MR. SIEGEL: I was going to ask it anyway.

MS. WEINER: Then let us allow Mr. Gentile the right to say and state his remark as he wishes to put it.

MR. SIEGEL: Okay.

MR. GENTILE: The whole thing boils down to what was the Astoria Federal's position as to Mr. Solimino's separation from Astoria Federal, what is it now, what was it then, and I direct it to Mr. Drewitz.

MS. WEINER: I think –

MR. GENTILE: Let Mr. Drewitz answer.

MS. WEINER: Take it chronologically.

MR. GENTILE: We want to know what it is now.

MS. WEINER: I would like to hear the answer and then whatever I feel necessary to state, I will state.

MR. DREWITZ: After the Board meeting where we discussed the changes –

MR. GENTILE: What Board meeting was this?

MR. DREWITZ: February 17th. After the Board meeting on Wednesday, the 17th of February, I called Angelo into my office and discussed the findings with him.

MR. GENTILE: What day was this?

MR. DREWITZ: That was on the 19th of February. February 19th, I called him into my office to discuss what we had discussed at the Board meeting and he was very well aware that the work load at the department had diminished extremely much because of high interest rates, so our lendings had taken quite a nose dive. Obviously there was no need for having a second Vice Presidency in the office and I told him that in my opinion it would be a long time before mortgage lending would reach plateaus that it was in in the past, so I gave him the option, Number 1, for a transfer into another department. I told him, "You know operation. Tell me what you think you could be qualified for to go into another department and we'll give it very serious consideration or you can take early retirement," so Angelo told me right off the bat that he has no interest in any other work and he only loves mortgages and he would go for early retirement, so in order to implement a retirement, we had to get him to sign an option agreement, which he refused to sign. He said he wanted first to discuss it with his attorney. I said, "You go right ahead," and at this point he never signed anything,

so obviously the pension was never implemented. Our Board also approved supplementary benefits for him until he became 65 years of age. The benefits were 70 percent, that he would get a supplemental payment that would give him an income equal to 70 percent of his current income and he asked if that could be increased. I brought it up at the next meeting and the Board decided to go to 75 percent of his total compensation package which would continue until he's 65, at which time it would phase out because Social Security payments would take over. So at this point, he didn't sign anything, he didn't do anything, so at his own option –

MR. GENTILE: He still has an option to transfer, Mr. Drewitz?

MR. DREWITZ: At this point, I would say no.

MR. SIEGEL: But at that point he did?

MS. WEINER: At the time that he spoke to Mr. Drewitz he had the option of transfer.

I would like to know from Mr. Solimino is that how it went down?

MR. SOLIMINO: No. He never, never mentioned a transfer to any department.

MS. WEINER: Would you please indicate for the record what did happen?

MR. SOLIMINO: I went there. I sat down. He was very, very nervous and fidgety and he says, "You know that the Association lost $2,000,000.00 last year," which actually was $1,600,000.00 to be exact, and he says, "My projection is that we'll lose between five and $8,000,000.00 this coming year, so we discussed it with the Board," he said, and he never, never mentioned anything about transferring to another department. He just said that they were forcing me to retire.

MR. DREWITZ: That's not true.

MR. SOLIMINO: It definitely is true. I am under oath.

MR. DREWITZ: So am I.

MR. SIEGEL: Did you have any other meetings with representatives of the bank regarding transferring or retirement?

MR. SOLIMINO: Yes.

MR. SIEGEL: When was that, sir?

MR. SOLIMINO: With Rhoda, when she came down. That was on March 3rd or March 4th.

MR. SIEGEL: Did you have any other meeting at which both Mrs. Baisi and Mr. Drewitz attended?

MR. SOLIMINO: Yes. On Friday. It would be March 5th.

MR. SIEGEL: Was transferring brought up at that time?

MR. SOLIMINO: I refused to sign a letter he wanted me to sign.

MR. SIEGEL: Was your ability to transfer brought up at that time?

MR. SOLIMINO: No.

MR. SIEGEL: Not at all?

MR. SOLIMINO: No. Never. I brought it up.

MR. SIEGEL: You asked if you could have a transfer? What did you say?

MR. SOLIMINO: Miss Baisi came down to my office. She said, "I have your supplement here. If you sign a letter you can have your supplement." So I read the letter. I never was offered another job and they said that was my prerogative, to retire. Actually they were forcing me to retire.

MR. SIEGEL: Was there ever a discussion at which –

MR. SOLIMINO: Let me finish.

MR. SIEGEL: – a transfer was brought up?

MR. SOLIMINO: So I read the letter. So Rhoda – may I call you Rhoda?

MS. BAISI: You may.

MR. SOLIMINO: I said, "I don't sign a pack of lies." She said, "What do you mean lies?" I said, "I wasn't offered another job and I didn't volunteer to retire. I was forced to retire." She did try to convince me that I was offered another job, but then in turn I convinced her that I wasn't, so she said to me, "Well, would you consider transferring to another department?"

MR. SIEGEL: What did you say?

MR. SOLIMINO: I said, "Rhoda, make an offer."

MR. SIEGEL: That is exactly what you said?

MR. SOLIMINO: Exactly, word for word. I says, "Make an offer." She said, "I don't know what department you want to go to."

Am I right or wrong?

MS. BAISI: Almost right. You said, "What else do I know besides mortgages."

MR. SOLIMINO: I did not say that.

MS. BAISI: That's what I remember you said, Angelo.

MR. SOLIMINO: So I said, "Make me an offer." She said, "Well, I don't know what department you'd like to go to." I says, "You mention it. Make me an offer." She says, "How would you like to have a job maybe as a branch manager?" I says, "Good. You made an offer." I says, "Number 1, what does it pay?" She says, "Between twenty and twenty-two five a year." I says, "Okay. What happens to my title?" She says, "Your title will be taken away then."

MR. SIEGEL: What did you say?

MR. SOLIMINO: I got up and I took the letter from my desk. I went downstairs and made a photostatic copy of the letter because I wanted to take it home to study and she wouldn't allow me to.

MR. SIEGEL: Did you answer about the transfer or did you suggest another department?

MR. SOLIMINO: No.

MR. SIEGEL: Can you think of another department you would have been well suited to?

MR. SOLIMINO: How about when Joe Salz was taken out of the Woodside office. He wasn't given a choice. He was just told he had to be transferred. If I was told to transfer to another department, I'd have to do it or be fired. I was not.

MR. SIEGEL: You were.

MR. SOLIMINO: I was not offered another job.

MR. SIEGEL: Sir, did you answer then with an option?

MR. SOLIMINO: No, I didn't, because it wasn't offered to me.

MR. SIEGEL: On Friday, the March 5th meeting, was a transfer discussed?

MS. BAISI: Yes.

MR. SIEGEL: Do you remember what was said?

MS. BAISI: I remember Mr. Drewitz said we did offer you – you probably did say it, but –

MR. GENTILE: Let's here what you say he said, please.

MS. BAISI: We went over the letter and he said, "Henry, you never offered me a position." He said, "Yes, I did." "No, you didn't." It was going back and forth. He said, "Maybe with all the confusion I was nervous, I didn't hear you."

MS. WEINER: Mr. Drewitz, did you offer the complainant at any time another position?

MR. DREWITZ: Yes, I did.

MS. WEINER: What was the position?

MR. DREWITZ: Let me qualify that. I told him he's been with Astoria for thirty some odd years. He should let me know what department he feels qualified in and let me know and we certainly would give him serious consideration for transfer to that department, so he told me very emphatically he has no interest in any other work. His first love or work, to that effect, was mortgages, and he would opt for early retirement.

MS. WEINER: We have his version and we have your version.

Just before a statement was made if he were not offered a position or a transfer and if he were offered one now would he accept it and the remark was made at this time he would not be offered another position.

Could I ask if the reason for that statement is because he has filed a complaint with the Division of Human Rights or what would be the reason? If there was a misunderstanding at that time and it is clarified at this time, why would a position not be offered at this time?

MR. DREWITZ: Number 1, with the hold we have on personnel we have no department openings at the present time. Rhoda knows we have an absolute freeze on personnel with the exception of Tellers, maybe a Clerk/Typist, that's about the only thing, but any executive staff, we're not taking on anybody in any kind of executive position and frankly I'm not very pleased about this whole mishmash.

MR. GENTILE: Mr. Drewitz, I have known you about thirty years and I have known you mostly in an executive capacity at Astoria and as a friend.

Were there many times when money became very tight at Astoria and all the other institutions had a freeze on mortgages in the past when Astoria's resources were nowhere as near as great as they are now or Astoria's pre-eminence in the mortgage field wasn't as great, did you reduce any personnel from the Mortgage Department?

MR. DREWITZ: It's hard to say at this point what we might have had, some attritions, some retirements, or somebody leaving.

MR. GENTILE: In the Mortgage Department?

MR. DREWITZ: Yes. I just can't think offhand. We always had a certain amount of turnover of some girls or so—

MR. GENTILE: We are talking about officers.

MR. DREWITZ: I can't think of it momentarily.

MS. WEINER: If there was a misunderstanding, Mr. Solimino, about being offered a job, in fact maybe—it was said there was an offer, if there was a position offered to you, did you state your desire for the transfer or to which department you would wish to be transferred?

MR. SOLIMINO: No, I didn't.

MS. WEINER: Okay. Anything further?

MR. GENTILE: Yes. I have a question.

MS. WEINER: Go right ahead.

MR. GENTILE: Mr. Siegel, you prepared a response for the respondent, a three and a half page letter?

MR. SIEGEL: I am counsel for the respondent. I am not here to testify, nor will I.

MR. GENTILE: Is Mr. Drewitz familiar with the letter you prepared?

MR. SIEGEL: Attorney/client privilege.

MR. GENTILE: Are you familiar with the letter?

MR. SIEGEL: Attorney/client privilege. If you want to ask whether he has seen the letter —

MR. GENTILE: I want to know whether he is familiar with it and subscribes to it. I think he is chargeable with it. I would like to know if he is.

MS. WEINER: Are you familiar with the response that was offered by your attorney to the Division?

MR. DREWITZ: Yes.

MR. GENTILE: Do you subscribe to the position taken by that letter?

MR. DREWITZ: What are you specifically referring to?

MR. GENTILE: The contents of the letter.

MR. DREWITZ: Of course I do.

MR. GENTILE: One thing that was said in the letter was that once the business related decision was made to eliminate Mr. Solimino's position, he was offered the opportunity to bid for any vacant position for which he was qualified. Such a transfer would have been without prejudice to his accrued seniority or benefits. Nonetheless he refused.

Do I understand that to mean he would have equal pay for any transfer he had?

MR. DREWITZ: No.

MR. SIEGEL: It says exactly what it says. Accrued seniority and benefits. It didn't say wages. It said accrued seniority or benefits.

MR. GENTILE: What does the Human Rights Division read in that letter?

MS. WEINER: I do not wish to comment on that. It is not my place to comment.

MR. SIEGEL: Frankly there could be no way of knowing until he transferred. He could have transferred to some lateral position, to a lower position. You couldn't know until the transfer was completed. In the past people have transferred to lower positions and received lower salaries. It depends where you wind up.

MR. GENTILE: In other words, the transfer would have been prejudicial perhaps to his income.

MR. SIEGEL: We have no way of knowing, because he did not transfer. All we know is he would not have lost seniority or pension benefits.

MR. GENTILE: What does seniority mean?

MR. SIEGEL: Tenure, years of service with the Association.

MR. GENTILE: Does seniority mean rank?

MR. SIEGEL: No. Titles mean rank. Seniority means seniority. Like in a union shop, seniority means seniority. Simple precise terms.

MR. GENTILE: Mr. Drewitz, wasn't it Mr. Solimino's function not only as a P.R. man but as a business getter from various sources?

MR. DREWITZ: No, he wasn't.

MR. GENTILE: He was not popular with people who dealt with Astoria Federal?

MR. DREWITZ: He was, but he never went on the field to gather any business. He was strictly an in-house man. He didn't solicit or call or leave the office.

MR. GENTILE: Wasn't he always busy on the phone? Everyone asked for Mr. Solimino?

MR. DREWITZ: He had a certain amount of following, yes.

MR. SIEGEL: The simplest question is now that he is gone and your staff is down to one full-time officer, is there a hole missing because he is no longer there?

MR. DREWITZ: Not at all.

MR. BEITER: The office is functioning.

MR. GENTILE: I would like to know if anybody else was severed for business reasons.

MS. BAISI: The whole department was reconstructed.

MR. GENTILE: Who was severed for business reasons?

MR. WEINER: Has anyone else been terminated?

MS. BAISI: There were transfers.

MS. WEINER: No one else terminated?

MS. BAISI: No.

MS. WEINER: I would want now for the record a reply to the respondent's reply upon belief that "had I been a younger staff officer I would not have been forced into early retirement." I would just like a reply to that.

MR. SIEGEL: Can I provide that?

MR. GENTILE: No. Mr. Drewitz, I would say.

MS. WEINER: Let me hear from the attorney.

MR. SIEGEL: Regardless of Mr. Solimino's age, he would not have been treated any differently. In fact, he would have been terminated instead of being offered the option of a lucrative early

retirement. The situation was such that two Vice Presidents were not required, that his abilities were less than Mr. Beiter's and he would serve as the sole Vice President. Miss Klecar, who was age 52, was deemed to be more qualified to do the role of Mr. Salz and Mr. Solimino and the department now functions with three instead of four. Had he been younger, he would have been fired straight out because he wasn't deemed qualified. However, he was offered this in recognition of the fact that he had been with the Association a long time and it was determined that a reward would be appropriate and that's what was offered.

MS. WEINER: Would you like to answer?

MR. DREWITZ: I think it's a feeling of compassion for the amount of years he had with us and nothing else but. Mr. Solimino, his performance as a Vice President fell way short of the mark and he was not an effective supervisor and he was not an effective representative of the Association in the absence of Mr. Beiter. The question of age discrimination doesn't even come into the picture here. We have many, many people on our payroll way older than Mr. Solimino. I'm only a few years behind him. I'm 60 years of age myself. If I had that policy, I'd be against myself. I, personally speaking, have a preference for more mature and older workers because generally speaking I think they're more reliable.

MS. WEINER: Then it is my understanding that had he been a younger staff officer he would have just been terminated?

MR. DREWITZ: That's right.

MR. SIEGEL: He would not have been offered early retirement.

MR. GENTILE: Mr. Drewitz, who would be now in the last few months or year more qualified in Mortgage Origination; Mr. Solimino or Mr. Chin?

MR. DREWITZ: Their functions were not exactly parallel.

MR. GENTILE: Mr. Chin is in the Mortgage Origination Department?

MR. DREWITZ: Yes. I would say Mr. Chin is every bit the equal of Mr. Solimino.

MR. GENTILE: When was he brought in?

MS. BAISI: 1977.

MR. GENTILE: Mary Klecar and Mr. Solimino, who would be more qualified?

MR. DREWITZ: Mary Klecar by far.

MR. GENTILE: I am asking about Mortgage Origination.

MR. DREWITZ: I would say they're on a par.

MR. GENTILE: Would you agree to that, Mr. Beiter?

MR. BEITER: Yes.

MR. DREWITZ: She's a super woman.

MR. GENTILE: She was brought in to replace Mr. Solimino?

MR. DREWITZ: She came in originally to replace Mr. Salz who was transferred to the main office. There was a turn around. She was at the main office, Salz was at Woodside, so we transferred them around.

MR. GENTILE: Did anybody ever ask you to have Mr. Solimino transferred to his department?

MR. DREWITZ: No.

MS. WEINER: Do you have anything you wish to say, or Mr. Solimino, in reference to Part 3 of your allegations?

MR. SOLIMINO: I'd like to direct my question to Mr. Greenberg, please.

MS. WEINER: Go ahead.

MR. SOLIMINO: What did you know about Mortgage Originations?

MR. GREENBERG: In terms of actually originating?

MR. SOLIMINO: What takes place in the Mortgage Department.

MR. GREENBERG: I could not originate a loan.

MR. SOLIMINO: Who did you speak to when you came down to make your survey?

MR. GREENBERG: Joe Salz.

MR. SOLIMINO: Does he know mortgages, the operation?

MR. GREENBERG: Yes. He seemed to know the operation of the department fairly well.

MR. SOLIMINO: He didn't know the first thing about Mortgage Originations, so how could you go down there and ask him for advice and you write out a resume, as you did, when neither one of you knew what the heck you were doing?

MR. GREENBERG: Joe was not the only one I spoke with.

MR. SOLIMINO: Who did you speak to?

MR. SIEGEL: Let him finish.

MR. SOLIMINO: I'm sorry.

MR. GREENBERG: I also spoke with Rhoda, the Director of Personnel. I spoke with our attorneys.

MR. SOLIMINO: What does Rhoda know about Mortgage Originations?

MR. GREENBERG: I don't know what she knows. I was interested in the key to problems there.

MR. SOLIMINO: How did you get a true evaluation?

MR. SIEGEL: We're speaking apples and oranges.

MR. SOLIMINO: Give me a chance to speak. Your client spoke.

MR. SIEGEL: You are entitled to the same opportunity.

MR. SOLIMINO: All right. How can you write up an evaluation when neither one of you knew what the heck you were doing?

MR. GREENBERG: I didn't write up an evaluation.

MR. SOLIMINO: I can tell you right now —

MR. GENTILE: You did not write up an evaluation?

MR. GREENBERG: No. Your client is trying to tell me that I wrote an evaluation of how the Mortgage Originations Department was working and not working. If you recall earlier what I said was there was so many personnel problems, personality conflicts, that I couldn't get into the work flow analysis because what should work on paper wouldn't work because this Clerk, when she was finished, would sit there and not go over and help the other one, so I didn't get into that work flow analysis. I could only do a very broad brush on what seemed to be the original problem, and I addressed that problem by saying they needed effective supervision.

MR. GENTILE: Did you get into the fact that a great many appraisals or offer commitments were not taken up because you weren't competitive with Greenpoint Savings Bank?

MR. SIEGEL: Objection.

MS. WEINER: We don't need objections here.

MR. GENTILE: Did you find anything out about that?

MR. GREENBERG: No.

MR. GENTILE: May I ask Mr. Drewitz some questions?

MS. WEINER: Yes.

MR. GENTILE: I have here a copy of a memorandum dated January 18th, 1982, which I first would like to give to you because I do not think they have that.

MS. WEINER: Is this going to be made part of the file?

MR. GENTILE: Yes. I'd like Mr. Drewitz to comment on it.

MS. WEINER: Then we have to allow him to read it.

You are submitting this for what reason?

MR. GENTILE: The reason being this is dated January 18th. It's a memorandum from Mr. Drewitz, the Chief Executive Officer, and it's addressed to Mr. Beiter and Mr. Salz. It does not mention Mr. Solimino in any way, shape or form. The subject is speed-up on loan appraisals. It admits about losing a great deal of business to the Greenpoint Savings Bank and it shows that in Mr. Drewitz's mind, or at least I suggest in his mind, you already had eliminated Mr. Solimino from the department because there is no mention at all, no criticism of Mr. Solimino's ineffectiveness or anything else. This is prior to the Board meeting in February.

MS. WEINER: I understand.

MR. GENTILE: He was an active member who outranked Mr. Salz at the time. He was more involved in obtaining appraisals for mortgage financing than anyone else. It does not refer to the lack of direction and motivation caused by ineffective supervision reported by Mr. Greenberg in the Director's minutes. He does show one thing. He suggests they go to Security Title, which I suggest is why Astoria was slow many times because Security was slow all the time. Just a suggestion, I like Security, but I had to use other companies because they were too slow.

Can Mr. Drewitz answer the question? I notice also a copy was given to Mr. Greenberg, is that right?

MR. GREENBERG: It says so on there.

MR. GENTILE: Look at it, please, Mr. Greenberg.

MR. GREENBERG: Can I ask who wrote the BCC on it?

MS. BAISI: Elena does that.

MR. GREENBERG: I guess I got it then.

MR. GENTILE: Do you know that letter?

MS. BAISI: No.

MS. WEINER: Do you wish to answer any of the questions?

MR. DREWITZ: The only thing I can say was it's a secretarial oversight. I send out many memorandums. Sometimes my secretary could have missed it and sometimes that happens and I even eliminated Frank Beiter once.

MR. GENTILE: It was not on your mind that time to sever Mr. Solimino from the operation, is that what you are saying?

MR. DREWITZ: Not at that time.

MR. GENTILE: This was prior to your investigation, January 18th?

MR. GREENBERG: I believe it was after. Maybe I can help you with the investigation. The idea to take a look at – investigation is really not what – the intent of what I did was to take a look and see if I could smooth out the department in the fall, October, November, that kind of time frame, of 1981.

MR. GREENBERG: Frank came up with a proposal we get some type of computer to process loan closings and that was the real reason I went looking into the department.

MR. GENTILE: Do you have expertise with computers?

MR. GREENBERG: Yes, I have some. The idea was to see what the work flow – how the work flow would fit into the computer. My initial reaction was you need a computer because by the time you punch all this stuff in you'll have to punch it out until you get the internal systems straightened out and that was the beginning of me looking into the department.

MR. GENTILE: Are you familiar with the Greenpoint operation?

MR. GREENBERG: Not at all.

MR. GENTILE: Are you, Mr. Drewitz?

MR. DREWITZ: Not too much, no.

MR. GENTILE: They eliminate credit reports.

MR. DREWITZ: That, I am aware of.

MR. GENTILE: That has helped hurt you.

MR. DREWITZ: They're a State chartered institution. They can do things which we can't do.

MR. GENTILE: You also request employment letters which a lot of people hate to sign, but you request it and that's not forced upon you, is it?

MR. DREWITZ: No, but I think it's good lending practice.

MR. GENTILE: That's what hurt you, your mortgage business also.

MS. WEINER: That is not what we are here for.

MR. GENTILE: He got complaints Astoria wasn't competitive and he wasn't listened to, is that true?

MR. SOLIMINO: Definitely.

MR. GENTILE: There were more points, higher interest rates, and Mr. Beiter was another advocate of higher interest rates.

MR. DREWITZ: We don't control interest rates.

MR. SIEGEL: Unless we are suggesting the Association was willing to lose millions to make him expendable for firing –

MR. GENTILE: He did not blame Mr. Solimino for business slowing down. He blamed the slow down on appraisals. They were getting the appraisals out. People weren't picking up the commitments when they found out they could do cheaper elsewhere.

MS. WEINER: I believe we have covered –

MR. SOLIMINO: I would like to ask a question.

How many times did I come in and suggest to you we call up the appraisals before this letter was even sent out – call up the people who requested appraisals, instead of writing up eleven sheets of paper on the history of the account, and that work was all wasted. The people didn't pick them up. One out of maybe ten would pick up the commitments, right?

MR. BEITER: You wanted to do this constantly. The system we had in there was the best we could comply with the requirements of RESPA.

MR. SOLIMINO: What would be your remark when I'd come in and give you advice as to how it should be done? What was your answer?

MR. BEITER: If it doesn't work out under the context of those laws, we can't do it. I'd love to do it, but we can't.

MR. SOLIMINO: You used to tell me you were the Mortgage Officer and you run the office.

MR. BEITER: That's true.

MR. SOLIMINO: You never took my suggestions.

MR. BEITER: I would not take a suggestion contrary to the law.

MR. SOLIMINO: Can I direct a question to Mr. Drewitz?

MS. WEINER: May I ask if Mr. Beiter has completed what he has to say?

MR. BEITER: In response to his latest one, yes, it's my department and I'll operate it to what I consider the mandates and the laws we operate under. Some of his suggestions, although I appreciated them and I had a lot of the thoughts myself, they just would not be in compliance with the laws, so they weren't used.

MS. WEINER: Do you wish to proceed, Mr. Solimino?

MR. SOLIMINO: Henry, I was on the Loan Committee, right?

MR. DREWITZ: That's right.

MR. SOLIMINO: Mr. Beiter said he spent a lot of time down at the main office on the Loan Committee.

What happened when you and I were on Committee? There was just three of us on the Loan Committee, you, myself and Frank, right?

MR. DREWITZ: Yes.

MR. SOLIMINO: You used to look at your watch and say, "My God, when you and I are on Committee we get finished in a half hour. I was back in the office in an hour. What is he doing there all day then?"

Can you explain that?

MR. DREWITZ: Sure, I can, for the simple reason Frank Beiter and I discuss various other aspects of the organization I wouldn't discuss with you.

MR. SOLIMINO: Sometimes you take so damn long when you're on Committee with Frank; did you ever say that to me?

MR. DREWITZ: Yes.

MR. SOLIMINO: Okay.

MS. WEINER: Is there something Mr. Gentile wants to say?

MR. GENTILE: Yes. I would like to ask Mr. Drewitz to explain this notice.

MR. DREWITZ: All right.

MR. GENTILE: That is dated what day, Mr. Drewitz?

MR. DREWITZ: February 24th.

MR. GENTILE: It appears you considered it an accomplished fact that he had retired.

MR. DREWITZ: So he told me. He told me he was taking an early retirement and he wanted it to be known the retirement was of his own choosing.

MR. GENTILE: Did he write that letter?

MR. DREWITZ: No.

MR. GENTILE: Who wrote that letter?

MR. DREWITZ: Who signed it?

MS. BAISI: Lena.

MR. GENTILE: You wrote that letter?

MS. BAISI: No, I didn't.

MR. GENTILE: You authorized it?

MS. BAISI: No.

MR. DREWITZ: I do my own letters.

MR. GENTILE: But that was posted in all the branches before you even worked out a suitable compensation for Mr. Solimino.

MR. DREWITZ: Angelo wanted that on the bulletin board.

MR. SOLIMINO: No. I said I didn't want a notice, Henry.

MR. DREWITZ: Yes, you did.

MR. SOLIMINO: Oh, the lies are flying here.

MS. WEINER: Excuse me. The memorandum we discussed just before that copies were made and distributed will be known as Complainant's Exhibit 1 entered on 11/29. This notice we are discussing is Complainant's Exhibit 2 entered 11/29. The reason we have to number these exhibits even though I have them, the respondent was not made aware of them before today they were going to be discussed.

MR. GENTILE: I have no objection.

MS. WEINER: I just have to let you know why I am doing what I am doing. I am keeping the originals.

MR. SOLIMINO: May I have a word?

MS. WEINER: Yes.

MR. SOLIMINO: I direct my remark to Henry. That notice there that was posted on the bulletin board, first of all I was against it. Secondly after two days it disappeared and I asked everybody in the department who had taken it down and nobody would admit it was taken down.

For what reason was it taken down?

MR. DREWITZ: I have no idea that was taken down. I certainly gave no orders on that. Why should I put up a notice and then take it down?

MS. WEINER: Is there anyone that wants to say anything about the contents of the memo?

MR. SOLIMINO: Which one?

MR. GENTILE: The notice of your resignation.

MS. WEINER: Do you wish to make any comments about the contents?

MR. SOLIMINO: At first he told me he was going to put up a notice. I told him no. He said, "Well, I'll show you a copy of one," and in it he had put for personal reasons I had requested an early retirement, which was a lie. I never volunteered to retire.

MR. DREWITZ: As a matter of fact, you saw this notice before this went on the board.

MR. SOLIMINO: It was posted on the board.

MR. DREWITZ: I told you exactly what was in there and I got your approval to it because you were very sensitive about it.

MR. GENTILE: Did you remove any fat from other departments, Mr. Drewitz?

MR. DREWITZ: What is fat?

MR. GENTILE: It is a slang word for excess personnel, your tightening of the belt.

MR. DREWITZ: We have had a freeze on hiring. As far as actual termination —

MS. BAISI: Can I answer that?

MR. DREWITZ: Sure.

MS. BAISI: Anyone that left who was on a full-time basis we hired a part-timer to fill in, except Tellers.

MS. WEINER: The people that have left, left of their own volition?

MS. BAISI: Yes.

MR. SIEGEL: I think to clarify it, more simply, is your department during this high interest rate disaster the most severely affected department?

MR. BEITER: Yes.

MR. SIEGEL: Is any other department affected as yours is?

MR. BEITER: No.

MS. WEINER: I think we have covered most everything, unless someone feels there is something that has not been covered.

MR. DREWITZ: I would like to make a comment. Mr. Gentile was questioning Mr. Greenberg's background. I hired Mr. Greenberg. He is a former employee of Pete, Warwick, Michelin Company. He is an extremely competent and brilliant man in his field and he certainly has the capacity to evaluate the operation of a department. As a matter of fact, that was one of his functions at Pete, Warwick, and he was in charge of audits at Astoria Federal for several years prior to joining forces with Astoria, so he has the intelligence, background and ability. The fact he doesn't know the itty-bitty things in structuring mortgages is completely irrelevant.

MR. SIEGEL: What is your title?

MR. GREENBERG: Senior Vice President.

MS. WEINER: Nothing goes after it?

MR. GREENBERG: Senior Vice President. That's enough.

MS. WEINER: In banks usually they say "in charge of".

MR. GREENBERG: Oh. Planning and Development.

MR. GENTILE: You refer to him as your house efficiency expert?

MR. SIEGEL: He refers to him as the Senior Vice President.

MR. DREWITZ: In charge of Product Development and Internal Operations.

MS. WEINER: Is there anyone else who wishes to say anything? Do you Mr. Solimino?

MR. SOLIMINO: I would like to show this to Mr. Drewitz.

MS. WEINER: I will make a copy of this. This is Exhibit C-3.

What about Exhibit C-3, Mr. Solimino?

MR. SOLIMINO: Rhoda should be very, very familiar with this.

What happens when somebody quits their job or is fired? Are they told to sign that form?

MS. BAISI: When they quit their job, yes, not when they're fired.

MS. WEINER: Both times, whether they leave of their own or whether they are terminated, they are asked to sign this form?

MS. BAISI: Not when they are terminated. When they leave on their own, that they separated of their own volition.

MR. SOLIMINO: What is the reason to have them sign that?

MS. BAISI: Just for records.

MR. SOLIMINO: It has nothing to do with unemployment, so they can't collect unemployment? Hasn't it been said to certain employees if they didn't sign that letter they wouldn't get a good reference?

MS. BAISI: Not from the Personnel Department.

MR. SOLIMINO: Would it shock you if I had witnesses to that effect?

MS. BAISI: Certainly. Not from the Personnel Department, believe me.

MS. WEINER: What would be your reason in a charge of age discrimination to need witnesses?

MR. GENTILE: To show the motivation of the respondent as far as regarding help, employees.

MS. WEINER: Would it show he was treated differently because of his age?

MR. GENTILE: It has a bearing on that other letter we had reciting what his great benefits were to be and that has a bearing on it because this is the practice. The practice is to get them to sign while they are weak, so that they cannot dispute it later.

MR. SOLIMINO: Henry, you spoke about seventy percent before, didn't you?

MS. WEINER: Does this have reference to this form?

MR. GENTILE: No. To his offered compensation.

MS. WEINER: We have to finish discussion on this form.

MR. SIEGEL: What is the relevance of this specifically?

MR. GENTILE: I explained it. It has a tie-in with this letter.

MR. SIEGEL: What is the tie-in?

MR. GENTILE: The tie-in being that this letter makes a statement, an untrue statement, that he made a decision to retire rather than transfer to another department.

MR. SIEGEL: And he said it was his recollection at the time that he did say, "I would retire and I don't want a transfer."

MR. GENTILE: To show this is a practice of the respondent.

MS. WEINER: Mr. Solimino, were you given this form to sign?

MR. SOLIMINO: No. I was given the other form to sign.

MS. WEINER: The reason I ask is this form is given to people, you state, that are looking to leave of their own volition.

MR. SOLIMINO: Well, it was my understanding that most of them had to sign that.

MS. WEINER: Were you not given this form?

MR. SOLIMINO: No. Definitely not.

MR. GENTILE: He was given this form.

MS. BAISI: The reason why we give this to the employees who leave is because we have to check on their benefits to make sure we pay them on the payroll and this is for the record, not for the reasons he stated. I just want to clarify that.

MS. WEINER: We are finished discussing this form and you were not given this form?

MR. SOLIMINO: No.

MS. WEINER: Anything further you want to discuss?

MR. SOLIMINO: Henry, when I came down there on a Monday afternoon you called me down to the office and you told me that the Board was very, very good to me, they were giving me – first you said $11,000.00 as a supplement, then you raised it to $15,000.00 and you said – you're remarks were the Board will go along with me, is that true? Now you're offering me – my salary was $36,850.00. Seventy percent of this is $25,795.00, but why do you keep saying, "I'm giving you seventy percent," when you're deducting my pension from that amount? Are you allowed to do that, deduct my pension?

MR. DREWITZ: Sure.

MR. SOLIMINO: Is it seventy percent then?

MR. DREWITZ: You're getting seventy percent of your actual salary. You're getting that between salary and supplemental benefits.

MR. SOLIMINO: Why do you say you're giving me seventy percent?

MR. DREWITZ: Because they don't have to give you anything.

MR. SIEGEL: I think you are getting that because you do not have to go on retirement prior to age 65 and get that deduction. If you had gone out before 65 and this wasn't given as a bridge-over –

MR. SOLIMINO: I was still taking a short ride on the pension.

MR. SIEGEL: Not if you took this and were given retirement at 65.

MR. SOLIMINO: I was still getting less on my pension.

MR. SIEGEL: The difference was being made up. They didn't have to give you anything. They were offering to bring you across –

MR. SOLIMINO: Because they didn't want me to have trouble here. That's why he was offering me this.

Do you have a copy?

MS. WEINER: I do not know that I have that copy. I will make a copy of it.

MR. GENTILE: Isn't it true he would then qualify for a smaller pension if he elected at that time rather than 65 or 70?

MR. DREWITZ: Sure.

MS. WEINER: This is Exhibit C-4.

MR. SOLIMINO: May I direct more questions to Mr. Henry Drewitz?

MS. WEINER: Yes.

MR. SOLIMINO: Henry, did the Board know about my retirement?

MR. DREWITZ: Of course they did.

MR. SOLIMINO: If they knew about it, why did you refuse me three times in one day to have a hearing before the Board? I wanted to speak to the Board and you screamed at me.

MR. DREWITZ: I didn't scream at you.

MS. WEINER: Finish your question and Mr. Drewitz will answer. If you wish to have him answer each question, then give him the time to answer.

MR. SOLIMINO: May I ask another question?

MR. GENTILE: Ask that question first.

MR. SOLIMINO: Why did you refuse me?

MR. DREWITZ: Board meetings don't run that way and I didn't scream at you.

MR. SOLIMINO: You most certainly did.

Did Sidney Krout know about my retirement?

MR. DREWITZ: There was a Board meeting discussing everything. Everybody knew about it.

MR. SOLIMINO: On March 8th it happened Sidney Krout went to the Woodside office. He saw my office was dark, no lights in it. It was empty. He started screaming where the heck was Solimino.

MR. DREWITZ: He doesn't scream either.

MS. WEINER: Go ahead.

MR. SOLIMINO: Why did he go around asking all the girls where is Solimino and why in God's name after Kathy Miller went up and told him I had to take an early retirement did he say, "Who the hell can retire from Astoria Federal and take an early retirement from Astoria Federal?" Your answer?

MR. DREWITZ: First of all, I wasn't there. Secondly, I can't believe that to be a factual statement because he was part of the discussion at the meeting. He was present and he certainly knew everything about it.

MR. SOLIMINO: You're saying Mr. Krout was there at the meeting, right, when I was discussed?

MR. DREWITZ: I don't know that he missed any meetings.

MR. SOLIMINO: I was terminated on March 5th. March 8th would be a Monday and I got a phone call about Sidney Krout and I called him up on the 9th at his home and I asked him if he knew anything about my retirement and he said, "How can I help you? What do you want me to do?" I said, "I don't want you to do nothing." I said, "Do you know I was forced to retire?" He said, "No," and he was ready to hang up because he realized he said the wrong thing.

What do you have to say about that?

MR. DREWITZ: I wasn't privy to the conversation.

MR. SOLIMINO: How come he can make a statement like that?

MR. DREWITZ: I don't know that the statement was made.

MS. WEINER: Do you have anything more you wish to say?

MR. SOLIMINO: Henry again, do you recall a meeting that you and I had at which time I told you that Mr. Salz had no knowledge of the Mortgage Origination procedure?

MS. WEINER: Approximately when was that meeting?

MR. SOLIMINO: That was – Mr. Beiter should know because he's the one who set it up for me. He told me to talk to Mr. Drewitz.

MS. WEINER: How long before the resignation or early retirement?

MR. GENTILE: Severance is the best word.

MR. SOLIMINO: I would say about six months before. Approximately six months before. I told you Mr. Salz had no knowledge of Mortgage Origination procedures, nor had he any intention of learning.

What did you do about it?

MR. DREWITZ: First of all, he was rather well versed in mortgages.

MR. SOLIMINO: He was?

MR. DREWITZ: Absolutely.

MR. SOLIMINO: I worked with him and he didn't know anything about mortgages. He didn't even know how to take an appraisal over the phone.

Did you know that?

MR. SIEGEL: Is he asking a question or debating? Are you completed?

MR. SOLIMINO: Why don't you relax.

MR. SIEGEL: Why don't you be a little more polite, so that someone can answer your questions?

MS. WEINER: You have asked your question?

MR. SOLIMINO: Yes.

MR. DREWITZ: Taking an appraisal over the phone, that's no job. You can take anybody off the street and in ten minutes tell him what to do. Joe Salz was hired as a specialist by Citizen Savings and Loan, which was acquired by Astoria January 31st, 1979. He was very knowledgeable in real estate matters and he was hired by Citizen to help in the re-structuring and hopefully liquidating some of their problem loans, so he knew quite

a bit about real estate and he has been in court giving testimony on many real estate matters, so to imply he knows nothing about real estate is not factual.

MS. WEINER: We won't argue the answer.

Anything else?

MR. GENTILE: I have a question.

MS. WEINER: Go right ahead.

MR. GENTILE: In deciding to reduce the staff in the Mortgage Origination Department, did you consider Joe Salz and Roger Chin to remove them to a different department?

MR. DREWITZ: Joe Salz was transferred to the main office eventually. Roger Chin is staying where he is.

MR. GENTILE: They are junior in age to Mr. Solimino as is Mr. Beiter.

MR. DREWITZ: That's irrelevant though in this matter.

MR. GENTILE: No. It's relevant in this hearing.

MR. DREWITZ: I don't think so.

MS. WEINER: If you are knowledgeable of their ages, are they younger or older?

MR. DREWITZ: They're younger.

MR. SIEGEL: To clarify that, Mr. Beiter, since you worked with all of them, would you compare the various job duties of Mr. Chin and Mr. Solimino and their various responsibilities and how they were different or the same back at the time?

MR. BEITER: Mr. Chin operates on the floor as such, in the middle of all the work. He does the credits, mostly checking mortgages prior to being sent up to see that they're complete. He shares that responsibility with Mr. Solimino. On the whole

I would say Solimino accepts more telephone calls since he's more widely known and more people would call and ask for him. Mr. Chin's duties have no involvement with builders. Mr. Solimino's did. He served on the Loan Committee. Mr. Chin did not. Mr. Chin was operating more in the nuts and bolts of the daily work than Mr. Solimino.

MR. SIEGEL: Would you say Mr. Chin was a beginner and not in a Vice President's role?

MR. BEITER: Yes. He came to us four or five years ago from the Roosevelt Savings Bank. He's a good quiet worker. You give him a pile of work and that's what he does. He didn't have the same capacity. He did not have the supervisory authority Mr. Solimino had.

MR. SIEGEL: In sum, they were totally different jobs?

MR. BEITER: Their jobs overlapped. He was subordinate to Mr. Solimino. Therefore, he had more to do than he.

MR. SIEGEL: As to what Salz did visa vis what Solimino did or didn't do, were they different jobs?

MR. BEITER: Different jobs. Salz was more parallel with Chin. He was more or less what you call a work-out specialist. You take problem real estate and try to make something out of it. When he was given authority to boss the floor, so to speak, this would be to facilitate the proper flow of the paper work that comes through from the time of its inception until the time it goes up to legal, just to see that each girl was properly trained and she was doing what she was supposed to do when she did it. He did not serve as part of the Loan Committee. He was being taught the credit function. He also did not have the contacts that Mr. Solimino had. Therefore, he would not accept as many calls from the street.

MR. SIEGEL: Would Mr. Solimino have functioned well in place of Mr. Chin?

MR. BEITER: That's where he started, yes.

MR. SIEGEL: Could he have done those nuts and bolts things?

MR. BEITER: I don't understand.

MR. SIEGEL: Considering his delegation of authority and he shunted things off, etc., where was he in terms of productivity in his job?

MR. BEITER: The job function as such, it's hard to compare the two. The one did not work too many interruptions in his daily work flow. The other did. Productivity could be measured in answering 50 phone calls in a day or processing 20 folders. They were different to that extent. He ran into the outside public more often than Chin, although we were breaking Chin into that too.

MR. SIEGEL: As a beginner?

MR. BEITER: Yes. Gradually introduce him to the brokers and the lawyers, as such. It's just the way we're structured. We try to do this with all our people.

MR. SIEGEL: Were Vice Presidents needed for those beginners jobs?

MR. BEITER: No.

MR. SOLIMINO: Frank, who broke in Roger Chin?

MR. BEITER: You did.

MR. SOLIMINO: Did I do a good job?

MR. BEITER: Yes.

MR. SOLIMINO: If my work load was marginal to unsatisfactory, how could I teach somebody how to be a mortgage man?

MR. BEITER: It has nothing to do with your work load. You taught the man. The man is good. He does his job.

MR. SOLILMINO: But somebody had to teach him?

MR. BEITER: Yes. You did the job yourself before.

MR. SOLIMINO: You admit I did a good job?

MR. BEITER: Yes. I have no complaints about your job.

MR. SOLIMINO: How about when we were still at the main office, you made Roger Chin Office Manager?

MR. WEINER: How long ago is that?

MR. BEITER: About three, four years.

MR. SOLIMINO: Did he work out?

MR. BEITER: No.

MR. SOLIMINO: He was too weak?

MR. BEITER: Yes.

MR. SOLIMINO: How come everybody around you is so weak? Could it be it extends to you being weak?

MR. SIEGEL: Does Mary Klecar have a problem running the office?

MR. BEITER: None whatsoever.

MR. SOLIMINO: She has nothing to do.

MR. GENTILE: That is the answer.

MR. DREWITZ: It's not true.

MS. WEINER: You have submitted her functions in her job?

MR. SIEGEL: Yes.

MS. WEINER: I think that at this point we have heard from both sides. I think both parties have been satisfied as to input. I think then that we can draw the investigation conference to a closing.

Any objections?

MR. DREWITZ: I would like to say something as a broad overview.

MS. WEINER: Go ahead.

MR. DREWITZ: When I became President of the Association I had the previous title as Mortgage Officer and in my advancement to President it was up to me to select a man that should succeed me as the Mortgage Officer. There were three people in the office that could be considered; Number 1, Mr. Solimino, a fellow by the name of Robert Riespeck who was the former President's son, and Frank Beiter, and in my evaluation of the people I selected Frank Beiter as the Mortgage Officer. I felt he had more on the ball, even though he was in a different department, and what areas he might have been a little weak he certainly could make it up in short order, so I selected him as the Mortgage Officer. Angelo I know very well for years as a friend, a co-worker, but in my position you have to sometimes make decisions that are best for the institution and in many ways Angelo was what I consider a weak individual. He lacked the power to make decisions. As a matter of fact, going back some years ago, he had a secretary Clara Alberigio. He couldn't even control her. She used to set her own lunch hours. I told him many times to speak to her and he could never get her to conform to regular lunch hour standards and so on down the line. So he's a good Joe, put a very poor administrator. The question of age discrimination doesn't even enter the picture here, because we don't discriminate on age. I'd be against myself. We hired a woman here in the Mortgage Origination Department, a part-timer. She's 66. I mentioned before and I'll repeat it again, I have preference for the senior people. I think they're generally more reliable. They work better. We don't have an absentee problem. So it was strictly on performance and nothing else but.

MR. GENTILE: On what did you base your decision on Frank Beiter?

MR. DREWITZ: Based on performance I saw over a number of years.

MS. WEINER: That I think will be the end of this conference.

MR. GENTILE: Thank you very much.

(Whereupon, the Investigative Hearing was concluded.)

_____

ANGELO J. SOLIMINO

_____

HENRY DREWITZ

_____

FRANK M. BEITER

_____

ARNOLD K. GREENBERG

_____

RHODA BAISI

Subscribed and sworn to before me
this _____ day _____, 1982.

_____

NOTARY PUBLIC

CERTIFICATE

I, MARK OSIPOW,

a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That, the within is a true record of this Hearing.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this Hearing.

/s/Mark Osipow
NOTARY PUBLIC

EXHIBIT 6 - DETERMINATION AND ORDER AFTER INVESTIGATION DATED JANUARY 25, 1983

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

Complainant	:	
Angelo J. Solimino,	:	
vs.	:	Case No.
Astoria Federal Savings and Loan	:	1E-E-A-82-82993A
Respondents	:	

DETERMINATION AND ORDER AFTER INVESTIGATION

On March 18, 1982, Angelo J. Solimino filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of his age in violation of the Human Rights Law of the State of New York.

After investigation and following a review of related information and evidence with named parties, the Division of Human Rights has determined in the above-entitled complaint that there is no probable cause to believe that the respondent (s) engaged in or was (were) engaging in the unlawful discriminatory practice complained of.

This determination is based on the following:

The record considered as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports

respondent's position that complainant was terminated because the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's Mortgage Origination Department. There is no evidence in the file that complainant's age was a factor in his termination.

The complaint is, therefore, ordered dismissed and the file is closed.

"Any party to this proceeding may appeal this order to the State Human Rights Appeal Board by filing with the Board a written notice of appeal within fifteen (15) days after service of this order. The notice of appeal must be filed by mail or in person at the office of the State Human Rights Appeal Board, Room 3224, Two World Trade Center, New York, N.Y. 10047. DO NOT FILE THE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. The Division and the Board are separate agencies. A notice of appeal delivered to or received by the Division, or any agency other than the Board, shall be deemed improperly filed and shall be dismissed by the Board."

Dated & Mailed: January 25, 1983

STATE DIVISON OF HUMAN RIGHTS

By _____
Dean MacPherson, Regional Director

TO: Mr. Angelo Solimino, Complainant
35 Ava Drive
Syosset, NY 11791

Astoria Federal Savings and Loan
37-14 30 Avenue
Long Island City, NY 11103
Att: Henry Drewitz, President

Joseph J. Gentile, Esq. - Attorney for Complainant
30-15 Thirtieth Avenue
Long Island City, NY 11102

Jackson, Lewis, Schnitzler & Krupman -
Law Firm for Respondent
261 Madison Avenue
New York, NY 10016
Att: Paul J. Siegel, Esq.

EXHIBIT 7 - NOTICE OF FILING APPEAL WITH STATE HUMAN RIGHTS APPEAL BOARD

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD
TWO WORLD TRADE CENTER - 25th FLOOR
NEW YORK, N. Y. 10047

TELEPHONE
488-2038
AREA CODE 212

ACKNOWLEDGMENT OF APPEAL

CASE TITLE:

ANGELO J. SOLIMINO,

COMPLAINANT-APPELLANT

VS

ASTORIA FEDERAL SAVINGS AND LOAN

RESPONDENT

CASE NO. 1E-E-A-82-82993A

APPEAL NO. 8948

TO ALL PARTIES:

Please take notice that an appeal to the STATE HUMAN RIGHTS APPEAL BOARD was filed on the above-titled case on January 31, 1983. The Original or Certified Record of the above entitled appeal was requested on February 7, 1983. It was submitted on February 11, 1983 by the State Division of Human Rights, and is now available for public inspection at the Board's office.

Please note the Appeal Board has limited review powers and must determine the appeal solely on the basis of the record compiled by the Division.

A public hearing will be scheduled, unless appellant, within 10 days from the date shown below, submits the attached *Waiver of Hearing* indicating that oral argument is not requested. When a hearing is scheduled, appellant must appear or the appeal will be dismissed.

If appellant wishes to submit a brief, it must be served upon all other parties *within 20 days from the date shown below*. Any reply brief from the Respondent must be served upon other parties *no later than 35 days from the date shown below*. Five (5) copies of all such briefs must be filed with the Board accompanied by proof of service to all other parties.

IMPORTANT NOTE: It is imperative that Appellant keep the Board advised of any change of address; *failure to do so can lead to dismissal of this appeal on the basis of abandonment.*

STATE HUMAN RIGHTS APPEAL BOARD

By: /s/ Irma Vidal Santaella, Chairman

Irma Vidal Santaella, Chairman

May 3, 1983

DATED AND MAILED:
TO (See list attached)

ALWAYS REFER TO APPEAL NUMBER WHEN WRITING OR TELEPHONING

APPEAL NO. 8948

DISTRIBUTION SHEET

APPELLANT

Angelo J. Solimino
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Syosset, N.Y. 11791

Joseph J. Gentile, Esq.
30-15 30th Avenue
Long Island City, New York 11102

RESPONDENT

Astoria Federal Savings and Loan
37-16 30 Avenue
Long Island City, New York 11103
Att: Henry Drewitz, President

Jackson, Lewis, Schnitzler & Krupman
261 Madison Avenue
New York, N.Y. 10016
Att: Paul J. Siegel, Esq.

DOHR

Commissioner H. Carl McCall
State Division of Human Rights
2 World Trade Center 53rd Fl.
New York, N.Y. 10047

Ann T. Anderson, Esq.
General Counsel ATT:_____
State Division of Human Rights
2 World Trade Center 53rd Fl.

EXHIBIT 8 - ORDER OF STATE HUMAN RIGHTS APPEAL BOARD DATED MAY 30, 1984

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center -
New York, N.Y. 10047
Tel: 488-2038 (area code 212)

NOTICE OF ORDER

To: All Parties to this Proceeding – APPEAL No. 8948

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Please note:

> "A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461 (1982)."

Attachment:

Form B8

ORDER

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD
----------X

ANGELO J. SOLIMINO,

COMPLAINANT-APPELLANT

vs.

ASTORIA FEDERAL SAVINGS AND LOAN,

RESPONDENT
----------X

Case No. 1E-E-A-82-82993A

APPEAL NO. 8948

HEARING SCHEDULED: December 21, 1983

PRESIDING: Honorable Tibby Blum

SUBMISSION ON THE RECORD:

Complainant-Appellant submits on the record

Respondent deemed submitted on the record

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *State Division of Human Rights* v. *Columbia University, et al*, 39 N.Y.2d 612 and *State Office of Drug Abuse* v. *State Human Rights Appeal Board*, 48 N.Y.2d 276, and

A majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or characterized by an abuse of discretion, it is

ORDERED that the Determination and Order of the State

Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

/s/ Thomas A. Conniff
Thomas A. Conniff
Acting Chairman

Dated & Mailed: May 30, 1984

To: (See list attached)

STATE HUMAN RIGHTS APPEAL BOARD

APPEAL NO. 8948

DISTRIBUTION SHEET

APPELLANT

Angelo J. Solimino
35 Ava Drive
Syosset, N.Y. 11791

Joseph J. Gentile, Esq.
30-15 30th. Avenue
Long Island City, New York 11102

RESPONDENT

Astoria Federal Savings and Loan
37-16 30 Avenue
Long Island City, New York 11103
Att: Henry Drewitz, President

Jackson, Lewis, Schnitzler & Krupman
261 Madison Avenue
New York, N.Y. 10016
Att: Paul J. Siegel, Esq.

State of New York
Department of Law
Two World Trade Center
New York, N. Y. 10047
Att: Ann Horowitz
Assistant Attorney General

DOHR

Commissioner H. Carl McCall
State Division of Human Rights
2 World Trade Center 53rd Fl.
New York, N.Y. 10047

Roberto Albertorio Esq.
General Counsel ATT:_____
State Division of Human Rights
2 World Trade Center 53rd Fl.
New York, N.Y. 10047

EXHIBIT 10 - ORDER OF DONTZIN, J. DATED MARCH 6, 1984 RE: SOLIMINO V. DREWITZ ET AL

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

----------X

ANGELO J. SOLIMINO,

Plaintiff,

-against-

HENRY DREWITZ, FRANK M. BEITER, ARNOLD K. GREENBERG, RHODA BAISI, JACKSON, LEWIS, SCHNITZLER & KRUPMAN PAUL J. SIEGEL, ANNABELLE WEINER and JEAN MacPHERSON,

Defendants.

INDEX NO. 22074/83

#121 of 10/24/83

----------X

MICHAEL DONTZIN, J.:

Companion motions numbered 121 and 185 on the calender of October 24, 1983 are consolidated for disposition.

This is an action for damages arising out of the termination of plaintiff's employment with Astoria Federal Savings and Loan Association ("Astoria Federal"). Named as defendants are four officers of Astoria Federal, counsel for Astoria Federal and two functionaries of the New York State Division of Human Rights.

By motion numbered 121 the Astoria Federal officers and counsel seek dismissal of the complaint for failure to state a cause of action and failure to exhaust administrative remedies. By motion numbered 185 plaintiff seeks to disqualify the law firm of Jackson, Lewis, Schnitzler & Krupman as counsel for the

defendant officers of Astoria Federal. Defendants cross-move for a stay of the disqualification motion pending determination of their motion to dismiss the complaint.

The complaint contains two causes of action. The first, some seventy five paragraphs long, asserts a long-standing scheme and conspiracy on the part of defendants Drewitz and Beiter, Astoria Federal's President and Chief Executive Officer and Vice President respectively, to terminate plaintiff's employment. It is alleged that the Astoria Federal defendants, together with counsel, conspired to procure plaintiff's unlawful, forced retirement; that false reports were prepared concerning plaintiff's lack of dedication and his choice of early retirement over a transfer to another position; and that false and perjurious testimony was given at a hearing conducted by the State Division of Human Rights with regard to an age discrimination complaint filed by plaintiff.

The second cause of action asserts that counsel for Astoria Federal libeled plaintiff in a position statement submitted to the State Division of Human Rights in response to the age discrimination complaint.

In support of the dismissal motion defendants maintain that the first cause of action asserts no cognizable theory of tort upon which recovery may be had. The second cause is challenged on the ground that the alleged libelous statements were made in the course of a quasi-judicial proceeding, were pertinent to the issues and, thus, absolutely privileged. It is alleged, further, that plaintiff has an appeal pending before the State Division of Human Rights and, only after exhaustion of that remedy, may judicial review be obtained.

Affording plaintiff's rather inartfully drawn complaint the benefit of every favorable intendment, the first cause of action appears to assert claims sounding in wrongful termination of employment, intentional infliction of emotional distress, prima facie tort, perjury and conspiracy. None of these claims, however, may withstand defendants' motion to dismiss.

It is settled law that a cause of action in tort will not lie for wrongful or abusive discharge of an employee at will (Murphy

v. American Home Products, 58 NY2d 293). Nor may the unavailability of such claim be circumvented by the assertion, upon the same set of facts, of causes for intentional infliction of emotional distress or prima facie tort (Murphy, supra at 303, 304). Although plaintiff maintains that he is not suing his former employer, Astoria Federal, and was never formally discharged, the substance of plaintiff's claim against the Astoria Federal defendants is the wrongful, malicious and unjustified termination of his employment via forced retirement. Clearly, plaintiff is engaging in semantics in an attempt to circumvent the rules laid down by the Court of Appeals in Murphy, *supra*.

Equally without merit is plaintiff's perjury claim. No cause of action exists for perjury committed in a prior proceeding unless the perjury is part of a fraudulent scheme greater in scope than the issues determined in the prior proceeding (Newin Corp., v. Hartford Accident and Indemnity Co., 37 NY2d 211). Here, the total objective of the alleged scheme was the unlawful termination of plaintiff's employment and this was the very issue submitted to the State Division of Human Rights for determination.

Similarly, the conspiracy claim may not be allowed. There is no substantive tort of conspiracy. Rather, allegations of conspiracy must refer to an actionable, underlying wrong and are permitted only to show that this wrong flowed from a common scheme or plan (Cunningham v. Hagedorn, 79 AD2d 702). Where, as here, the underlying conduct is not actionable, the charge of conspiracy must fall too.

The second cause of action for libel must also be dismissed. The alleged defamatory statements, contained in the position statement submitted to the State Division of Human Rights by counsel for Astoria Federal, concerned the quality of plaintiff's job performance and were clearly pertinent to the issues raised in the age discrimination proceeding. Proceedings conducted by the State Division of Human Rights are quasi judicial in nature (Rabinovic v. State of New York, 108 Misc 2d 664) and, thus, communications made in connection therewith are absolutely privileged and may not be subject to an action for libel or slander (Julius J. Studley Inc. v. Lefrak, 50 A.D.2d 162).

Inasmuch as the complaint must be dismissed on the merits, the Court need not address the issue raised by defendants concerning the exhaustion of administrative remedies.

The motion by defendants for dismissal of the complaint is granted. The motion for disqualification of counsel is denied as moot.

Settle order.

DATED: March 6, 1984

J.S.C.

FILED
APRIL 18 1984
COUNTY CLERK'S OFFICE
NEW YORK

EXHIBIT 12 - ORDER OF MYERS, J. DATED APRIL 12, 1984
RE: SOLIMINO v. DREWITZ ET AL

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I
----------X

ANGELO J. SOLIMINO,

Plaintiff,

-against-

Index No.
22074/83

HENRY DRESITZ, FRANK M. BEITER, ARNOLD K. GREENBERG, RHODA BAISI, JACKSON LEWIS, SCHNITZLER & KRUPMAN, PAUL J. SIEGEL, ANNABELLE WEINER and JEAN MacPHERSON,

#190 of
11/28/83

Defendants.
----------X

ALLEN MURRAY MYERS, J.:

Defendants Weiner and MacPherson move to dismiss the complaint upon the grounds of lack of subject matter jurisdiction CPLR 3211[a][2]; immunity from suit for quasi-judicial acts performed in the course of their official duties; and failure to state a cause of action (CPLR 3211[a][7]). Plaintiff cross-moves to disqualify the Attorney-General from representing Weiner and MacPherson.

Plaintiff Solimino is a former bank officer who was employed in the mortgage origination department of Astoria Federal Savings and Loan Association. The complaint alleges that four of Solimino's fellow bank officers (defendants Dresitz, Beiter, Greenberg, and Baisi) together with the bank's legal counsel (additional defendants) conspired to force Solimino to take early retirement; that Solimino filed an age discrimination complaint

against his employer with the Federal Equal Employment Opportunity Commission; that the complaint was transferred to the State Division of Human Rights "SDHR"); and that the Hearing Rights Specialist in charge of the investigation (defendant Weiner) and the Regional Director of SDHR (defendant MacPherson) conspired with the bank's counsel to dismiss Solimino's age discrimination complaint. Specifically, Solimino asserts that Weiner's investigative report was based upon erroneous information supplied by the bank's counsel; that on the date of the investigative hearing, defendant bank officers together with the bank's legal counsel collusively discussed and prepared their testimony, evidence and strategy with Weiner prior to plaintiff's arrival at the hearing in order to effectively preclude Solimino's right to a fair and impartial hearing; and that defendant MacPherson was closely allied with defendant Weiner in seeing to it that the bank would be successful in obtaining dismissal of plaintiff's age discrimination complaint.

On January 25, 1983, the SDHR dismissed Solimino's complaint, finding that there was no probable cause to believe that the bank had engaged in unlawful discrimination on the basis of age. Solimino then filed a notice of appeal dated January 28, 1983 to the State Human Rights Appeal Board ("SHRAB"). Later, Solimino commenced the instant action seeking compensatory and punitive damages.

Turning to the instant motion, it is well settled that officials acting in a quasi-judicial capacity may not be held liable for decisions involving acts relating to such functions (see, Rottkamp v. Young, 21 A.D. 2d 373 [2nd Dept. 1964], aff'd 15 N.Y. 2d 831). Moreover, it has been specifically held that a proceeding before the SDHR is quasi-judicial in nature (Rabinovich v. State of New York, 108 Misc. 2d 664 [Ct. Cl. 1981], order confirmed, 78 A.D. 2d 597 [1st Dept. 1968], mot. for lv. to app. denied, 52 N.Y. 2d 704). Consequently, defendants Weiner and MacPherson, as quasi-judicial officials, may not be held liable in a damages suit for the effects of their alleged oppressive official action.

The court further notes that judicial review of the SDHR proceeding as it relates to Solimino's claims against Weiner and

MacPherson is inappropriate, in view of Solimino's pending appeal before the SHRAB. Upon Solimono's exhaustion of his administrative remedies, Solimino may commence a CPLR Article 78 proceeding to review the final determination of the SHRAB (Executive Law 298) and any allegations of the officers' bias (see, State Division of Human Rights v. Merchants Mutual Insurance Co., 59 A.D. 2d 1054 [4th Dept. 1977]; Klein v. O'Hagan, 51 N.Y. 2d 784, rev'g 70 A.D. 2d 514 [1st Dept. 1979]; See also, Matter of Wesser v. State of New York, 94 A.D. 2d 681, aff'd 60 N.Y. 2d 785).

Accordingly, the motion by defendants Weiner and MacPherson to dismiss the complaint for failure to state a cause of action against them is granted. Plaintiff's cross-motion to disqualify the Attorney-General from representing Weiner and MacPherson is denied as moot. Had the court reached the merits of the cross-motion, plaintiff clearly failed to demonstrate a conflict of interest which would warrant interference with movants' selection of counsel (see, Schmidt v. Magnetic Head Corporation, 97 A.D. 2d 151, 163 [2nd Dept. 1983]).

Settle Order.

Dated: APR 12, 1984

/s/A.M.M.
J.S.C.

EXHIBIT 14 - ORDER OF APPELLATE DIVISION, FIRST DEPARTMENT DATED MAY 7, 1985 RE: SOLIMINO v. DREWITZ, ET AL.

At a term of the Appellate Division of the Supreme Court held in and for the first Judicial Department in the County of New York, on May 7, 1985

Present – Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Arnold L. Fein
Ernst H. Rosenberger, Justices.

----------X

Angelo J. Solimino,

Plaintiff-Appellant,

-against- : 23283-84

Henry Drewitz, Frank M. Beiter, Arnold K. Greenberg, Rhoda Baisi, Jackson, Lewis, Schnitzler & Krupman, Paul J. Siegel, Annabelle Weiner and Jean MacPherson,

Defendants-Respondents.

----------X

Appeals having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Michael Dontzin, J.), entered on April 16, 1984, which granted defendants Drewitz, Beiter, Greenberg, Baisi, Jackson, Lewis, Schnitzler & Krupman & Siegel motion to dismiss the complaint and denied plaintiff's motion to disqualify the attorneys Jackson, Lewis, Schnitzler & Krupman from representing the aforementioned defendants, and from an order of said court (Allen Myers, J.), entered on May 10, 1984, which granted

defendants Weiner and MacPherson's motion to dismiss the complaint and denied plaintiff's motion to disqualify the Attorney General from representing these two defendants,

And said appeals having been argued by Joseph J. Gentile of counsel for appellant, by Yolanda Pizarro of counsel for respondents Weiner and MacPherson, and by Anthony H. Atlas and Michael S. Cecere of counsel for respondents Drewitz, Beiter, Greenberg, Baisi, Jackson, Lewis, Schnitzler & Krupman and Siegel; and due deliberation having been had thereon,

It is unanimously ordered that the two orders so appealed from be and the same hereby are affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

AFFIDAVIT OF ANGELO J. SOLIMINO IN OPPOSITION TO MOTION DATED MARCH 11, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X	:	CV-85-0555
	:	(MAC)
ANGELO J. SOLIMINO,	:	
	:	AFFIDAVIT
Plaintiff,	:	OF PLAIN-
	:	TIFF
-against-	:	ANGELO J.
	:	SOLIMINO,
ASTORIA FEDERAL SAVINGS AND	:	IN OPPOSI-
LOAN ASSOCIATION,	:	TION TO
	:	MOTION
Defendant.	:	FOR SUM-
----------X		MARY
		JUDGMENT

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

ANGELO J. SOLIMINO, being duly sworn, deposes and says:

1. I am the Plaintiff herein, and make this affidavit in opposition to the Defendant's motion for summary judgment.

2. As the Court will note, both the *Moving Affidavit* and *Statement of Material Facts Not In Dispute* (annexed to the Notice of Motion) have been made and sworn to or signed by ANTHONY H. ATLAS, ESQ., an attorney for the Defendant, a person who obviously hasn't personal knowledge of the facts, who cannot set forth such facts as would be admissible in evidence and who cannot show affirmatively that he, the Affiant, is competent to testify as to the matters that are stated in his Moving Affidavit. It is clear that the Defendant has not followed the requirements of Rule 56(e) of the Federal Rules of Civil Practice, in submitting these improper supporting papers.

3. I have read and am familiar with the Deposition that was taken of me on December 1, 1988, the Moving Affidavit of ANTHONY H. ATLAS, ESQ., herein, the Defendant's alleged Statement of Material Facts Not In Dispute and the alleged Statement of Facts contained in the Defendant's Memorandum of Law in Support of this motion.

4. That as will hereinafter appear, the *actual date* of my meeting with President Henry Drewitz, when he first notified me that the Board of Directors was forcing me to retire, was *February 22nd, 1982*, and *not February 18th, 1982*, as is being claimed in the Moving Papers herein, and as will also hereinafter appear, *Henry Drewitz actually lied to me*, when he told me that it was a *Board decision that I had to retire*.

5. Because of Mr. Drewitz' lies about the Board of Directors' decision, and his *unauthorized notice* to me that I had to retire, I quit my office and job on *March 5th, 1982*, which was the last day of work that he allowed me, and thus, *because I was caused to leave my job under the pressure of his false representations, the facts show conclusively that I was actually constructively discharged on March 5th, 1982, and that this date must be considered as the last alleged discriminatory act that occurred with respect to the termination of my employment.*

6. There is absolutely no question but that I would have remained at my job, except for the *apparently official order* that I had to leave, and for the intolerable pressures that Henry Drewitz and his cohorts put upon me *in order to have me quit*.

7. When Henry Drewitz falsely notified me of the Board's alleged decision, which was purportedly made at the February 17th, 1982 meeting, *he was not authorized to do anything but to follow the Board's recommendations*, as were set forth in the Board's own minutes, as follows:

> "...Mr. Drewitz speak to Mr. Solimino, advise him of the changes to be made in the lending department and determine if he wishes to be transferred to another department or desires early retirement with the

> Association giving supplemental benefits up to his 65th birthday when social security benefits become available. The Directors, in authorizing these changes, gave Mr. Drewitz authority to work out a suitable compensation arrangement with Mr. Solimino if he decides to retire."

(excerpt of the Minutes of the Board of Directors Meeting held on February 17th, 1982, which minutes are annexed hereto as *Plaintiff's Exhibit A)*

8. During my aforesaid February 22nd, 1982 meeting with Henry Drewitz, after he falsely told me that it was a "Board Decision" that I was forced to take "early retirement" and then gave me a rundown of the supplemental benefits that he said the Board had authorized, I asked him repeatedly for permission to have a hearing before the Board, and he became very angry and flatly refused, and these facts came out during the Investigative Hearing that was held on November 29, 1982, at the Human Rights Division, as follows:

MR. SOLIMINO: Henry, did the Board know about my retirement?

MR. DREWITZ: Of course they did.

MR. SOLIMINO: If they knew about it, why did you refuse me three times in one day to have a hearing before the Board and you screamed at me.

MR. DREWITZ: I didn't scream at you.

(Defendant's Exhibit 5, Page 68, lines 12 through 19 inclusive)

9. I hereby submit that I was very uptight, tense and even sometimes confused during the taking of my said Deposition held on December 1, 1988, and I now understand that my interrogator, ANTHONY H. ATLAS, ESQ., was doing his best to stampede me into agreeing with his leading questions, solely in order to exploit my *honest mistake* in date that was made

in the charge that I filed with the Equal Employment Opportunity Commission (EEOC).

10. At the time I made my complaint at the Offices of EEOC, on *March 3rd, 1982*, two days before I was coerced into leaving my job, I was interviewed by Equal Opportunity Specialist, Joseph E. Christopher, regarding the facts of my claim of age discrimination, and because of the terrible state I was in, I was very happy that my good friend, Joseph J. Gentile, who is my attorney herein, had volunteered to go with me at the time, as this was a matter of first impression for us both.

11. At the time I made this complaint at the offices of EEOC, at 90 Church Street, New York, N.Y., I was a broken man, both mentally and physically, as I had hardly slept since I had first been told by President Henry Drewitz, that I was being forced to take "early retirement" at age 63, from a place where I had worked for over 36 years; I took this job when Astoria Federal Savings and Loan Association was a very small institution, shortly after I was discharged from the United States Army – I had been a prisoner of war in Germany for 27 months, ever since our tank-destroyer company had been captured in North Africa, – but I believe that this trauma of losing my lifetime employment with Astoria Federal was even harder to take than being captured and imprisoned in any enemy land.

12. That in response to Mr. Christopher's questioning, I inadvertently confused the date when I had the fateful meeting with Mr. Drewitz, and the date that I gave Mr. Christopher, as the date the most recent or continuing discrimination took place, that of *February 18th, 1982, was wrong*, and I made this *Mistake* because I didn't even stop to think that said meeting took place on the very *Monday* following the said Board of Directors meeting of February 17th, 1982, and this Monday's date was actually *February 22nd, 1982*.

13. When I later signed and swore to the truth of the typewritten charge, on March 10th, 1982, I again didn't stop to think about the actual date of the said meeting with Mr. Drewitz, which I knew took place on a *Monday*, as I was only concerned with following the instructions in Mr. Christopher's form

covering letter, which he had mailed to me, together with the typewritten charge on *March 4th, 1982*, the day after I visited his office at the EEOC, as aforesaid. A copy of the EEOC covering form letter, dated 3/4/82, which was sent to me by Mr. Christopher, together with the typewritten charge, is annexed hereto as *"Plaintiff's Exhibit B"*.

14. I only visited the EEOC offices once, on *March 3rd, 1982*, with Mr. Gentile, as aforesaid, and the typewritten charge was returned to the EEOC by mail, and thereafter presumably filed by EEOC on March 18th, 1982.

15. The moving papers herein contain *a weave of misleading statements and efforts* to try to deceive the reader (and Court) into believing that I, as the Plaintiff, must remain stringently bound to the *mistaken date* of February 18th, 1982, and during the taking of my said Deposition, Mr. Atlas did his best to make me adhere to that date, *by ignoring my mention of February 22nd, 1982*, at one point, when he asked the question and I answered, as follows:

> Q. Did Henry give you any reason why you were being terminated or why he was pushing you into early retirement?
>
> A. Yes. He told me the first day I went down, which was on February 22, 1982, he said that the association had lost about $2 million a year before. . ."

(from *Defendant's Exhibit* 3, page 112, lines 15 through 20)

and at the other point, when he asked the question and I answered, as follows:

> Q. I'm asking you about when you met with Henry on the 18th or 19th of February, whenever it was.
>
> A. 22nd.

(from *Defendant's Exhibit* 3, page 117, lines 14 through 16.)

16. As a matter of fact, further proof that I remembered that the day of our meeting was on the *Monday* (February 22nd,

1982), following the said Board of Directors meeting of February 17th, 1982, is found in *Defendant's Exhibit 5, herein*, which is the Transcript of the Investigative Hearing of 11/29/82, held at the Division of Human Rights, as follows:

> MR. SOLIMINO: Henry, when I came there on a Monday afternoon you called me down to the office and told me that the Board was very good to me....."

(from *Defendant's Exhibit* 5, page 66, lines 10 & 11)

17. One of the most important *Material Fact Issues* that remains *wide open*, and must be resolved in this action, is *the issue of whether I resigned from my job, voluntarily retired early from my job, was directly terminated from my job, or was constructively discharged from my job.*

18. The Defendant has never come to grips with this Issue, even though this Issue is of paramount importance, and Actually of the Essence in any employment discrimination suit, since it obviously makes a great deal of difference whether an employee quit of his own accord, retired, was fired or was forced out of his job because of unbearable treatment and conditions.

19. The Defendant and its attorneys have taken different positions and at different times, possibly because they have tried to tailor the facts to the situation at hand, as may be gathered from the following examples, in chronological order:

(a) On February 24th 1982, *Henry Drewitz* caused a Notice to All Employees to be posted, stating as follows:

> "Angelo J. Solimino, a vice president in the mortgage department at the Woodside Office of our Association *has taken early retirement* effective Friday, March 5, 1982.

(b) The minutes of the Board of Directors meeting of 3/17/82, contain this subtitle in capital letters:

ANGELO J. SOLIMINO ANNOUNCES RETIREMENT

(c) On September 30, 1982, *Paul J. Siegel, Esq.*, now a partner in Jackson, Lewis, Schnitzler & Krupman, the Defendant's attorneys, wrote a letter to the Human Rights Division, wherein he stated (about Solimino):

"He rejected both the opportunity to transfer and the early retirement bonus program offerd to him. He then *voluntarily resigned. Plaintiff's Exhibit C*

(d) On June 16, 1983, the same *Paul J. Siegel, Esq.* in a Letter-Brief written to the Human Rights Appeal Board, stated:

(Solimino) failed to present evidence to rebut Astoria Federal's showing of legitimate business reasons for removing him from the Mortgage Origination Department and *terminating his employment. Plaintiff's Exhibit D*

(e) On March 11, 1985, *Michael J. Cecere, Esq.*, a partner in Jackson, Lewis, Schnitzler & Krupman *signed* the *Answer* to the Complaint herein, and set forth as the SEVENTH DEFENSE therein:

"20. Plaintiff *voluntarily terminated* his employment with Defendant.

(from Defendant's Exhibit 2 page 4)

(f) On February 10, 1988, *Anthony H. Atlas, Esq.* of Counsel to Jackson, Lewis, Schnitzler & Krupman swore to an Affidavit in Opposition to Plaintiff's Motion to Take the Deposition of Paul J. Siegel,

"Plaintiff, who was an officer of Defendant Astoria Federal, *was discharged from that employment on March 5th, 1982*"

(g) On February 10, 1988, the same *Paul J. Siegel, Esq.* swore to an Affidavit in Opposition to Plaintiff's Motion to Take the Deposition of Paul J. Siegel,

"Any and all knowledge and information which I have with respect *to the termination of the Plaintiff* herein were obtained by me by way of confidential communications to me. . ."

20. Thus it is obvious that a serious fact issue exists, not only between the pleadings, but also amongst the Defendant's Chief Executive Officer, Henry Drewitz, and the individual attorneys from Jackson, Lewis Schnitzler & Krupman; since the Answer has not been amended, the legal position of the Defendant is that I voluntarily terminated my employment, and the legal position of the Plaintiff, as set forth in my Complaint is: On March 5th, 1982, the Defendant wilfully terminated the plaintiff's employment because of his age."

21. On February 24th, 1982, on a Wednesday, Henry Drewitz asked me to come to his office, in order to discuss the supplemental benefits that I was to receive up to my 65th birthday, which were to amount to 70% of base 1982 salary, less the amount of the reduced pension monies II was to receive; this is what he said that had been authoized by the Board of Directors, and he had already mentioned this matter two days before, on February 22nd, 1982, when he first told me that the Board had ordered that I should take early retirement.

22. After I left Mr. Drewitz office, I happened to meet my wife's boss, Edward J. Price, Vice President in charge of Mortgage Servicing, and he took me aside, and with a very sad and pitying expression told me, "*Angelo, I really tried for you*; when I found out what was happening, I begged Henry to have you transferred to Mortgage Servicing, as my assistant, at least until you reached 65, but he wouldn't budge", in fact, I asked him at least 3 different times, but he put me off". – I feel sure that this is exactly the way he told me, or in words very close to these quoted.

23. Months later, when we had the Investgative Hearing, on November 29th, 1982, at the Human Rights Division offices in Queens, both Henry Drewitz and Rhoda Baisi tried to brazen out this pretext of an offer of a transfer, but when my attorney,

Joseph J. Gentile directly asked Henry Drewitz about it, it went as follows:

MR. GENTILE: He still has an option to transfer, Mr. Drewitz?

MR. DREWITZ: At this point, I would say no.

MR. SIEGEL: But at that point he did?

MS. WEINER: At the time that he spoke to Mr. Drewitz he had the option of transfer. . . ."

(*Defendant's Exhibit 5, lines 15 throught 21*)

24. It is obvious from the foregoing dislogue that Henry Drewitz *was retaliating* for my bringing on the age discrimination complaint; that Paul J. Siegel, Esq., *was trying to salvage* his client, Astoria Federal, *from any retaliation stigma*, and that Ms. Weiner, the supposedly impartial investigator, *was also helping the employer's representatives sustain their story of the alleged offer of a transfer*, (that is why she was also made a party defendant in the New York Supreme Court action, the Complaint of which is set forth as *Defendant's Exhibit 9*, which fully describes what went on in the so-called Human Rights proceedings, and shows that ANNABELLE WEINER'S behavior throughout her so-called "investigation" was undoubtedly given over to the employer's representatives). It should be obvious that Ms. Weiner did not become alerted in any was to the unequivocal retaliatory statement made by President Henry Drewitz, in the conversation she had just taken part in,

25. Another incident that happened during the Investigative Hearing *that demonstrated retaliatory conduct* on the part of Henry Dewitz, representing my employer, was where the Human Rights hearing investigator, Ms. Weiner, *was actually doing the questioning but still did not recognize the retaliatory conduct that was being perpetrated as a response to her questions, was as follows:*

MS. WEINER: ". . .Just before a statement was made if he were not offered a position or a transfer and if he were offered one now he would accept it and the remark was made at this time he would not be offered another position.

Could I ask if the reason for that statement is because he has filed a complaint with the Division of Human Rights or what would be the reason? If there was a misunderstanding at that time and it is clarified at this time, why would a position not be offered at this time?

MR. DREWITZ: Number 1, with the hold we have on personnel we have no department openings at the present time. Rhoda knows we have an absolute freeze on personnel with the exception of Tellers, maybe a Clerk/Typist, that's about the only thing, but any executive staff, we're not taking on anybody in any kind of executive position and frankly I'm not very pleased about this whole mishmash."

(*Defendant's Exhibit 5, page 35, lines 24, 25 and page 36, lines 2 through 20*)

26. The Defendant's *only affiant* herein, ANTHONY H. ATLAS, ESQ., alleges that at the said Investgative Hearing of November 29, 1982, "...the Plaintiff had a full and fair opportunity to litigate his claim of age discrimination..." (paragraph 9 of his Affidavit), and claims that "The undisputed material facts also show that Plaintiff's claims are procedurally precluded. The Division was acting in a judicial capacity with respect to Plaintiff's claims." (paragraph 18 of his Affidavit). It is

extremely convenient for the Plaintiff's case that the Defendant saw fit to supply the entire transcript of that Investigative Hearing. (Defendant's Exhibit 5) so that this Court can determine for itself *whether the Division was acting in a judicial capacity*.

27. A reading of the transcript of said Hearing (*Defendant's Exhibit 5*) will disclose that *it was not conducted by an administrative Judge of any kind*, and that the *Human Rights Investigator* who presided over that Hearing:

(a) actively participated in giving testimony;

(b) made conclusory statements throughout;

(c) permitted Paul J. Siegel, Esq., the Respondent's attorney to testify at length and ad nauseam, in place and stead of the Defendant's witnesses;

(d) in accepting Vice President Arnold Greenberg's testimony as an expert witness in the matter of the running and efficiency of the Mortgage Origination Department, when he admittedly knew nothing about mortgage origination (*Defendant's* Exhibit 5, page 45, lines 24, 25, page 46, lines 2 *through* 7, *page 61, lines 22 through 24*)

(e) completely overlooked flagrant evidence of retaliation in many instances, as hereinbefore set forth;

(f) participated in making a decision finding that the Plaintiff *was terminated* for business related reasons, although the Defendant's position letter written by Paul J. Siegel, Esq., dated 9/30/82, and sent as a pleading to the Human Rights Division, maintained that (Solimino "voluntarily resigned", and throughout the Hearing itself, the Respondent-Employer's witnesses would not be pinned down to the said position that *Solimino was terminated*.

28. Annabelle Weiner, the so-called Human Rights Specialist, who was permitted to conduct both the investigation and the Hearing, was also the person who prepared an "Investigation

Report dated October 5, 1982, that completely summarized the conclusions set out in the "position letter" of Paul J. Siegel (*Plaintiff's Exhibit C*) and accepted them as *factual findings; she had only received said "position letter" the day before*, on October 4th, 1982, and her so-called "Investigation Report" concludes that (Solimino) resigned of his own volition", and that his "work productivity and supervisory effectiveness was considered to be marginal or unsatisfactory dating back to 1975". She finally concluded that "Complainant's position was eliminated for sound and lawful businesss reasons.", *all just as neatly written for her by Paul J. Siegel, Esq.*, in the "position letter".

(*A copy of this Investigation Report made by Annabelle Weiner is annexed hereto as Plaintiff's Exhibit E*)

29. After the Plaintiff received the unfavorable determination of the Human Rights Division, dated January 25th, 1983, set forth as *Defendant's Exhibit 6*, herein, the Plaintiff appealed that determination to the New York Human Rights Appeal Board, by filing a Notice of Appeal and a letter from Joseph J. Gentile, plaintiff's attorney, which protested the determination and gave our reasons therefore. A copy of my Notice of Appeal is annexed as *Plaintiff's Exhibit F*, and a copy of Mr. Gentile's letter is annexed as *Plaintiff's Exhibit G*.

30. After filing the Notice of Appeal, both parties herein received an Acknowledgement of Appeal from the State Human Rights Appeal Board, dated May 3, 1983, which stated in the 4th paragraph:

> "If appellant wishes to submit a brief, it must be served upon all other parties *within 20 days from THE DATE SHOWN BELOW*. Any reply brief from the Respondent must be served upon other parties *no later than 35 days from the date shown below*.

(*excerpt from Defendant's Exhibit 7*)

31. The Plaintiff filed his appeal brief within the time allotted to us, but Paul J. Siegel, Esq., called my attorney, Mr. Gentile, and requested an extension of time, which was refused, especially because the law appeared to be that even the Appeal Board could

not enlarge the parties' time for either filing an appeal brief or the reply brief, however, Paul J. Siegel, acting for the Defendant, evidently called up Rena Riback, Esq., Counsel to the Human Rights Appeal Board, and received a 20-day extension of time, until June 20, 1983. A copy of Paul J. Siegel's letter to Rena Riback, Counsel to the Human Rights Appeal Board, is annexed hereto as *Plaintiff's Exhibit H*.

32. When my attorney, Joseph J. Gentile received a copy of Mr. Siegel's letter to the Appeal Board, showing that an improper extension had been granted, he sent a letter, dated June 8th, 1983 by certified mail to the Human Rights Appeal Board, protesting the illegal extension and pointing out that the Rules of Practice were *mandatory* in stating that the appeal brief had to be filed within 20 days and the reply brief had to be filed *no later* than 35 days from the date of the Acknowledgement of Appeal Notice, but this protest was disregarded and the Respondent's very late reply brief was accepted. A copy of Mr. Gentile's said letter protesting the illegal extension of time is annexed hereto as *Plaintiff's Exhibit I*.

33. I respectfully submit to this Court that the *decision making process* that took place at the administrative levels in my age discrimination case presents a very valid argument *as to why a Federal Court should not give any preclusive effect to any administrative determinations made in a matter*, especially because of the complete lack of judicial training of the "investigators" such as Annabelle Weiner, who might be equated to a "rent control" clerk in civil service ratings, and because of the improper way that both the Investigative Hearing and the Human Rights Appeal were handled.

34. The Defendant's position that the Plaintiff should have first further appealed to the Appellate Division is not well taken, because an examination of the Appeal Board's Order, confirming the determination of the Human Rights Division, *Defendant's Exhibit 8*, herein will show that on page 3 thereof, there is a cautionary note to anyone that is aggrieved by said Order, as follows:

> "A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461 (1982)."

35. The action that I brought in New York County, which is described in the *Complaint* set forth as *Defendant's Exhibit 9*, was brought while the Appeal Board appeal was still pending, and was not brought against Astoria Federal Savings, the Defendant herein, who was my employer, and that case should not be construed as any sort of appeal to the New York State Courts involving the Division of Human Rights determination that was made against me.

36. I have submitted herewith supporting affidavits made by my wife, RITA SOLIMINO, who is a former employee of the Defendant Astoria Federal Savings, and from former Astoria Federal employees CATHERINE C. MINCONE, formerly Catherine C. Miller (and referred to as "KATHY MILLER" in the Investigative Hearing) and JEANNETT SILVERS, both of whom worked in the Mortgage Origination Department, and both of whom offer testimony that shows that the Defendant's witness and Paul J. Siegel, Esq., did not testify truthfully either in their writings or during the Investgative Hearing when they downgraded my abilities in my position and job.

37. My wife's affidavit clearly shows that my fateful meeting with President Henry Drewitz was on *February 22nd, 1982, a Monday*, just as I remembered during my Deposition, and that *my mistake* was made at the EEOC, and as I have stated herein, I was a very broken man and just didn't think at the time. My wife's affidavit also substantiates the fact that I was never offered a transfer by my employer or its representatives in management, and that the kindly efforts made by Edward J. Price, Vice President of Mortgage Servicing, were flatly turned down by Henry Drewitz, the President of the Defendant.

38. The affidavits of former employees CATHERINE C. MINCONE and JEANNETT SILVERS, clearly show that I was an able Vice President in the Mortgage Origination Department

and a capable employee who carried on much more than his share of the work, and had no problems in supervising personnel; their affidavits also show that I trained a lot of people to do the work in our department, and that I and my secretary did all of the building loan mortgages by ourselves.

39. The true facts are that I trained ROGER CHIN and KATHY MILLER to do mortgage origination work, that I helped train FRANK BEITER, when he became MORTGAGE OFFICER, that I helped train the said JEANNETT SILVERS to do our work, *but the record does not show* that I helped train ROBERT RIESBECK, the son of the late President, Edward Riesbeck, to do both mortgage origination work and savings department managerial work, that I also taught JOHN MASTRODOMENICO, to take over as Branch Manager at the Ditmars Savings branch where I was the first manager, that I was teaching JOSEPH SALZ to do mortgage origination work, until I was terminated, *and that I even* taught Henry Drewitz how to handle the Savings Department at the Main Office, when I first came into Mortgage Origination, and he was ordered to take over the Savings Department.

40. It is respectfully prayed that the Defendant's motion herein be denied in all respects, and that the Court will give me the fullest consideration in this matter.

ANGELO J. SOLIMINO

Sworn to before me this
11th day of March, 1989

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT:

EXHIBIT C - POSITION STATEMENT OF ASTORIA DATED SEPTEMBER 30, 1982

ATLANTA
BALTIMORE
LOS ANGELES
SAN FRANCISCO
ST. LOUIS
WASHINGTON, D.C.
WHITE PLAINS, N.Y.

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
251 MADISON AVENUE • NEW YORK, N.Y. 10016
(212) 697-8200

PRACTICE LIMITED TO LABOR AND
EMPLOYMENT LAW ON BEHALF OF MANAGEMENT

September 30, 1982

Ms. Annabelle Weiner
Human Rights Specialist I
State of New York
Executive Department
Division of Human Rights
89-02 Sutphin Boulevard
Jamaica, New York 11435

Re: Angelo J. Solimino v. Astoria Federal Savings & Loan Assn., 1E-A-82-82993A

Dear Ms. Weiner:

Responding further to the Division's August 13, 1982 request for the Association's position in the above-referenced matter, we provide the following in the order stated in your letter. This response is based solely upon the Association's initial investigation, and is subject to being further clarified or supplemented.

1. In response to the specific allegations contained in Angelo Solimino's complaint of age discrimination, the Association states as follows:

> *First Paragraph:* Solimino was not denied any benefits, compensation or other term or condition of employment because of his age. Instead, due to the low volume of work performed by the Association's Mortgage Department, Solimino was offered the choice of transfer to another position in the Association, without

loss of seniority, or early retirement. He rejected both the opportunity to transfer and the early retirement bonus program offered to him. He then voluntarily resigned.

Second Paragraph: It is true that "the mortgage industry is very slow and that two Vice Presidents were no longer needed" in that Department. However, Solimino fails to state that his work productivity and supervisory effectiveness has been repeatedly rated as marginal or unsatisfactory.

Third Paragraph: Solimino was, indeed, the Association's oldest officer. However, his age was not considered in the Association's decision to reorganize the Mortgage Department. The actual duties performed by Solimino were minimal and are now performed by other mortgage Department officials and clerical personnel.

2. Mr. Solimino's position was eliminated for business-related reasons. As reflected in the enclosed minutes of Astoria Federal Savings' Board of Directors, Respondent decided to reorganize its Mortgage Department in order to expedite appraisal and commitment procedures through more effective supervision. (*See* Respondent's Exhibit A.) In addition, a reduction-in-staff was deemed to be necessary because the volume of mortgage lending was very low and the prospects for rapid recovery were slight. Thus, there was no need to maintain four mortgage lending officers and certainly no business justification for two vice presidents in this small department. Consequently, in light of Mr. Solimino's documented poor performance as a supervisor, it was determined that his position would be eliminated. (See comments on his 1975, 1976, 1977, 1978, 1979, 1980 and 1981 Employee Performance Evaluation firms, attached as Respondent's Exhibits B, C, D, E, F, G and H, respectively.)

Once the business-related decision was made to eliminate Mr. Solimino's position, he was offered the opportunity to bid for any vacant position for which he was qualified. Such a transfer would have been without prejudice to his accrued seniority or benefits. Nonetheless, he refused.

He was also offered the option of early retirement, which would have been supplemented by additional benefits. He initially accepted this offer, but then inexplicably decided to reject it.

3. To date, statements have not been obtained from witnesses. However, the Association is prepared to attend a fact-finding conference and substantiate the reasons for its decision to reorganize the Mortgage Department.

4 and 5. Between 1980 and 1982, the Association terminated thirty-two (32) employees, of which only seven were over 40. (21.9 percent). Of these seven, two employees were bus drivers who were terminated when the Association eliminated its bus service. Thus, only five of the thirty (16.7 percent) employees actually discharged were over age 40.

The number of discharged persons who are between the ages of forty and seventy is far less than the overall percentage of older workers in Astoria Federal Savings' workforce. There are 161 employees over *age* 40 in the association's total workforce of 405 workers (39.8%).

In the Mortgage Department as reorganized, the average age of the nonclerical mortgage personnel is 45. The workers are:

Name	*Position*	*Age*
Frank Beiter	Vice President	52
Mary Klecar	Ass't Vice President	52
Roger Chin	Ass't Secretary	31

Prior to Ms. Klecar replacing Mr. Solimino and Mr. Salz's transfer to the Morgage Servicing Department, the average age in the department was 46. The difference is *de minimus* and certainly does not reflect a deliberate effort to terminate older workers.*

* Ms. Klecar also replaced Mr. Salz, Assistant Secretary, age 38, who was transferred to the Mortgage Servicing Department as part of the departmental reorganization.

Finally, contrary to Solimino's assertion, Astoria Federal Savings does not discriminate on the basis of age with regard to the employment of officers. In fact, the average age of Astoria Federal Savings officers is 47.25; five of the twelve are over 50 (41.7 percent) and ten of twelve are over age 40 (83.3 percent).

6. Mr. Solimino was replaced by Mary Klecar, a 52 year old woman who holds the title of Assistant Vice President. Ms.Klecar has regularly received outstanding performance ratings. Her administrative skills have enabled her to perform many administrative tasks in the Mortgage Department.

• • • •

The foregoing recitation of the facts relevant to this matter, and the comparative date provided, clearly rebut Mr. Solimino's complaint of age discrimination. Consequently, his meritless complaint should be dismissed.

Cordially,
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Paul J. Siegel

PJS/tmf

bcc: Henry Drewitz
Rhoda Baisi
Martin F. Payson, Esq.

EXHIBIT E - INVESTIGATION REPORT DATED OCTOBER 5, 1982 FROM DIVISION OF HUMAN RIGHTS

STATE OF NEW YORK
Executive Department
DIVISION OF HUMAN RIGHTS

INTER-OFFICE MEMORANDUM

To: Jean MacPherson, Regional Director — Office 1E-Queens

From: Annabelle Weiner, HR Specialist I — Date October 5, 1982

Subject: Angelo S. Solimino vs Astoria Federal Savings and Loan — Case No. 1E-E-A-82-82993A

INVESTIGATION REPORT (10/5/82) 060

This complaint was filed on August 4, 1982. The complainant alleges unlawful discrimination by the respondent based on age. Complainant is sixty-three (63) years of age.

The information contained herein was obtained through interview with Paul J. Siegel, Attorney for respondent on August 13, 1982; investigation inquiry; information dated August 18, 1982 and correspondence received from respondent dated September 30, 1982; and the documentation attached hereto.

Exhibit R-A - Reorganization of Mortgage Dept.
Exhibits R-B, C,D,E,F,G, and H - Employee Performance Evaluation forms for complainant 1975-1981.

Respondent denies discrimination against complainant in the terms, conditions and privileges of employment because of his age. Respondent claims the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's mortgage origination Department. Complainant was offered the choice to transfe- to another

position with respondent without loss of seniority or early retirement. Complainant declined both offers and resgined of his own volition.

Respondent determined two vice presidents were no longer needed in the Mortgage Origination Department as the Mortage industry is very slow.

Respondent submitted documentation to support the fact that complainant's work productivity and supervisory effectiveness was considered to be marginal or unsatisfactory dating back to 1975.

Respondent admits complainant was their oldest officer. However, denies complainant's age was not considered in respondent's decision to reorganize the department in which complainant was employed. Complainant's position was eliminated for sound and lawful business reasons.

Respondent states the individual who replaced complainant, Ms. Klecar, age fifty-two (52), also replaced another employee, Mr. Solz, age thirty-eight (38) who was transferred as part of the reorganization. Ms. Klecar has received outstanding performance ratings.

EXHIBIT F - NOTICE OF APPEAL TO STATE HUMAN RIGHTS APPEAL BOARD DATED JANUARY 28, 1983

NEW YORK STATE : EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

	:	Case No.
Complainant,	:	
ANGELO J. SOLIMINO,	:	1 E-E-A-82-82993A
	:	
-vs.-	:	NOTICE OF
	:	APPEAL
ASTORIA FEDERAL SAVINGS	:	
AND LOAN ASSOCIATION,	:	
	:	
Respondent.	:	

TO THE STATE HUMAN RIGHTS APPEAL BOARD:

PLEASE TAKE NOTICE that ANGELO J. SOLIMINO, the above named Complainant, hereby appeals on the law and the facts to the STATE HUMAN RIGHTS APPEAL BOARD, from the Determination and Order After Investigation made by the Division of Human Rights, Queens County Office, on the 25th day of January, 1983, wherein there was a finding made of "no probable cause to believe that the Respondent engaged in or was engaging in the unlawful discriminatory practice complained of" and from each and every part of said Determination, as well as from the whole thereof.

Dated: Long Island City, N.Y.
January 28th, 1983

I am the Complainant Herein
And Have Authorized This
NOTICE OF APPEAL

/s/ Angelo J. Solimino
Angelo J. Solimino

Yours, etc.
JOSEPH J. GENTILE
Attorney for Complainant
30-15 30th Avenue
Long Island City, N.Y. 11102
Tel. No. (212) 726-6262

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE TO BE TRIED DATED APRIL 21, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

	:	
ANGELO J. SOLIMINO,	:	CV-85-0555
	:	Judge Glasser
Plaintiff,	:	
	:	PLAINTIFF'S
-against-	:	STATEMENT OF
	:	MATERIAL
ASTORIA FEDERAL SAVINGS	:	FACTS AS TO
AND LOAN ASSOCIATION,	:	WHICH THERE
	:	EXISTS A
Defendant.	:	GENUINE ISSUE
	:	TO BE TRIED

Pursuant to Local Court Rule 3 (g), Plaintiff Angelo J. Solimino hereby submits, in Opposition to Defendant's Motion for Summary Judgment, this statement of material facts as to which the Plaintiff contends that there exists a genuine issue to be tried:

1. On *February 22nd, 1982, a Monday*, Plaintiff Angelo J. Solimino was called to the office of Henry Drewitz, President of Astoria Federal Savings, and was told by Mr. Drewitz that the Board of Directors had decided to terminate his employment and to offer him early retirement (Defendant's Exhibit 3, which consists of excerpts of Solimino's depo., at page 112, lines 19 & 20, and page 117, line 16).

- the Defendant contends in Paragraph "2" of the Defendant's Statement of Material Facts Not in Dispute, that this meeting took place on *February 18, 1982*.

2. On February 21st, 1985, Plaintiff Angelo J. Solimino filed a complaint in this Court, alleging that the Defendant had

violated the Age Discrimination in Employment Act, in terminating his employment; Plaintiff contends that this action was filed within three years of his alleged Notice of Termination, which took place on *February 22nd, 1982*, as aforesaid;

- the Defendant contends that this action was filed three days late, because of its position that the alleged notice was given on February 18, 1982.

3. Plaintiff Angelo J. Solimino contends that he was mistaken when he gave the Equal Employment Opportunity Commision the date of February 18, 1982 as the date when he was given the alleged Notice of Termination by President Henry Drewitz, and explains how it happened in his Affidavit in Opposition herein, sworn to on March 11th, 1989.

- the Defendant *has not rebutted* the Plaintiff's affidavit of these facts with *any statement or affidavit of President Henry Drewitz*, who was admittedly the only other person with direct knowledge of the date, time and place of the said meeting, which took place between himself and the Plaintiff, and it is clear that the Defendant's Attorneys are only relying upon the mistaken date that was given to the EEOC as aforesaid, and it is also clear that their authority for their paragraph "2" of their Statement of Material Facts Not in Dispute, given as "Solimino depo. at 111", is *not accurate*, as "Solimino depo. at 112", the next page of Defendant's Exhibit 3, shows that Mr. Atlas was unable to reap the benefits of his very contrived and suggestive questioning, since Solimino was able to correct the said date to the correct one of *February 22nd, 1982* on said page 112, lines 18 & 19, of "Solimino depo."

4. Although paragraph "3" of the Defendant's Statement of Material Facts Not in Dispute alleges that "At that meeting, Mr. Drewitz told Plaintiff that the Board of Directors had decided to terminate Plaintiff's employment and offer him early retirement. .", the Defendant Astoria Federal Savings *has presented many different versions of the Plaintiff's departure from his employment*, as is carefully outlined in paragraph "19" of the

Plaintiff's Affidavit in Opposition to the Motion for Summary Judgment herein, -everything from his having taken "early retirement" and having "voluntarily resigned", through Mr. Atlas' sworn statement that the Plaintiff "was discharged on March 5th, 1982". Since the facts show that *President Henry Drewitz did not have the authority from the Board of Directors to give the Plaintiff a notice of termination*, during their said meeting (Plaintiff's Exhibit A, herein), but that none-the-less, the Plaintiff was obliged to leave his employment on the *5th day of March, 1982, solely due to Mr. Drewitz' gross deception and wrongful insistence*, and it is Plaintiff's position that he was *constructively discharged*, as a result, and that therefore, the disputed date of when he received the alleged notice of termination from Mr. Drewitz, should be disregarded, in favor of the date of March 5th, 1982, as the date when his cause of action accrued, so that his filing of the complaint herein on February 21st, 1985, was timely, and well within the statutory three years that is mandated for a wilful discharge.

- the Defendant, Astoria Federal Savings, in its official Answer to the Complaint, still maintains that "Plaintiff voluntarily terminated his employment with Defendant", and this unamended Answer tends to bolster the Plaintiff's argument that he was actually constructively discharged on March 5th, 1982, the day that he felt obliged to leave his employment.

5. Paragraph "5" of the Defendant's Statement of Material Facts Not in Dispute alleges that on March 4th, 1982, when Rhoda Baisi asked Plaintiff to sign a letter concerning his supplemental pension benefits, Plaintiff knew his employment by Defendant had already been terminated; this statement should instead be changed to read "Plaintiff believed his employment by Defendant had already been terminated", *as Plaintiff did not know at the time* that *Henry Drewitz had lied to him about the Board of Directors' order*, concerning his future with Astoria Federal Savings (Plaintiff's Exhibit A, herein).

6. Paragraph "6" of the Defendant's Statement of Material Facts Not in Dispute, is erroneous, *in that March 18, 1982, is the date when the EEOC filed Plaintiff's charge;* the "Division" was not involved until much later.

7. Paragraph "8" of the Defendant's Statement of Material Facts Not in Dispute, quotes the mistaken date of February 18, 1982, from Plaintiff's said charge that was filed with EEOC, but this date is disputed herein, as the mistake is explained in the Plaintiff's Affidavit in Opposition to this motion.

8. The Defendant, Astoria Federal Savings, in its *position letters* to both the Human Rights Division (Plaintiff's Exhibit C, page 2) and to the H.. ıan Rights Appeal Board (Plaintiff's Exhibit D, page 3) stated that its reason for the termination of Angelo J. Solimino, the Complainant, was a "reduction in staff" and a "reorganization" of its Mortgage Origination Department. Plaintiff has instead, consistently complained that he was discriminated against because of his age, and that Astoria Federal's reasons of "reduction in force" and "structural reorganization" were only pretextual. In fact, during the "Investigative Hearing" held in the Human Rights Division on Novembeı 29, 1982 (the minutes of which are set forth as Defendant's Exhibit 5) the Plaintiff contested these claims, and a reading of said Hearing will show that these reasons of "reduction in staff" and "reorganization" were hollow, and without any real basis in fact. In a recent *United States Court of Appeal case, held in the Second Circuit, Montana* v. *First Federal Savings and Loan Association of Rochester,* 88-7068, cited in the *New York Law Journal of March 13, 1989,* on page 5, the Court held that the Plaintiff had established a prima facie case of age discrimination, and had set forth specific facts *raising a genuine issue as to whether the employer's reason for termination was pretextual.* The Court stated that in a reduction-in-force case, or a structural reorganization case, a discharged employee who seeks under the standard set forth in *McDonnell Douglas Corp.* v. *Green* 411 U.S.792, 36 L Ed 2d 668, 93 S Ct 1817 (1973) to establish a prima facie case, need not show that she was replaced by a younger, newly hired employee, - as the Court noted that in a prior case, *Hagelthorn* v. *Kennecott Corp.*,

710 F. 2d 76 (2nd Circuit, 1983), it had held that the *McDonnel Douglas* formula is not inflexible. Thus it is clear that Defendant Astoria Federal Savings' reasons for terminating the Plaintiff, - because of alleged "restructuring" of the mortgage origination department, and a reduction-in-force", served to create a genuine factual issue, as to whether those proffered reasons were pretextual. A copy of an excerpt of subdivision A 2, entitled "Pretext", from this recent (February 21, 1989) 2nd Circuit decision of *Montana* v. *First Federal Savings and Loan Association of Rochester,* is annexed hereto as *Plaintiff's Exhibit J,* in order to show the Court's reasoning as to the existence of this genuine issue of fact in age discrimination cases where the employer alleges that the plaintiff-employee was terminated only because of revamping changes that were necessitated by "business reasons".

9. The Defendant has put into evidence as its *Exhibit 5,* the complete transcript of the Investigative Hearing that was held in the Human Rights Division on November 29, 1982. This transcript is replete with Astoria Federal Savings' claims that the Plaintiff, Angelo J. Solimino, was incapable of supervising the personnel who were working in the Mortgage Origination Department, and that his "work productivity" (as is stated in Paul J. Siegel, Esqs., position letter to the Human Rights Division, set forth as *Plaintiff's Exhibit C,* on page 2), was "marginal or unsatisfactory". In its *Answer,* which is set forth as *Defendant's Exhibit 2,* in the Fourth Defense thereof, the Defendant alleges: "Each and every action of Defendent which is the subject of the complaint, was taken for legitimate, non-discriminatory business reasons only." There can be no doubt that this defense of "business reasons" was meant to cover the Defendant's alleged claims that the Plaintiff's work had deteriorated badly, after 36 years of service, and that his supervisory abilities were ineffective.

- the Plaintiff has rebutted these *factual issues* with his own affidavit and with affidavits from two former co-workers who are inarguably experts in mortgage origination work, Catherine C. Mincone and Jeannett Silvers, showing that these Defendant's

claims were completely pretextual; but none-the-less, the foregoing controversy over the Plaintiff's abilities clearly serves to show that these issues of "work productivity" and "supervisory effectiveness" are also material fact issues that should be resolved at a trial.

10. In the said Investigative Hearing transcript, the witnesses for the Defendant employer claimed that the Plaintiff was offered the opportunity of a transfer to another department, but that he refused same (*Defendant's Exhibit 5*, pages 32 through 35) and Paul J. Siegel, Esq.'s letters to both the Human Rights Division and the Human Rights Appeal Board (*Plaintiff's Exhibits C & D, on* page 2, of each), also state this offer of a transfer, and that the Plaintiff refused such offer, but the Plaintiff Solimino has denied that any such offer was actually made.

- the Plaintiff, in his own affidavit, and his wife, Rita Solimino, in her affidavit, have both shown that the only possible viable transfer that he might have had, to the Mortgage Servicing department, - which transfer was urged upon President Henry Drewitz, by Edward J. Price, the Vice-President in charge of Mortgage Servicing, *was refused* by Mr. Drewitz, thus showing that this question of whether or not a viable transfer was offered also remains open as a genuine factual issue to be tried. (It should be remarked that the Defendant has not rebutted the Plaintiff's said affidavits by any affidavits from Henry Drewitz and Edward J. Price).

Respectfully submitted,

/s/ Joseph J. Gentile
JOSEPH J. GENTILE
Attorney for Plaintiff
30-15 30th Avenue
P.O. Box 2175
Long Island City, N.Y. 11102
(718) 726-6262

Dated: Queens County, N.Y.
April 21st, 1989

EXHIBIT J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 91—August Term 1988
Argued: August 29, 1988 Decided: February 21, 1989
Docket No. 88-7068

ELEANOR H. MONTANA,

Plaintiff-Appellant,

—against—

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROCHESTER,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge,*
CARDAMONE and PRATT, *Circuit Judges.*

Appeal from summary judgment of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, dismissing plaintiff-employee's claims of age and gender discrimination.

Affirmed on gender discrimination claim; reversed and remanded on age discrimination claim.

CHARLES D. MAURER, New York, NY, *for Plaintiff-Appellant.*

MICHAEL MORAVEC, Buffalo, NY (Phillips, Lytle, Hitchcock, Blaine & Huber, of Counsel), *for Defendant-Appellee.*

PRATT, *Circuit Judge:*

The district court granted summary judgment dismissing claims of Eleanor H. Montana that in discharging her First Federal Savings & Loan Association of Rochester (First Federal) discriminated against her on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (ADEA) and on the basis of gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Title VII). We affirm the dismissal of the sex discrimination claim, because plaintiff failed to establish even a prima facie case of sex discrimination. On the age discrimination claim we reverse and remand, because plaintiff's submissions both established a prima facie case and set forth specific facts raising a genuine issue as to whether the employer's proffered reason for termination was pretextual.

I. FACTS

Montana began her employment with Knickerbocker Federal Savings and Loan Association (Knickerbocker) in

• • •

2. *Pretext*

First Federal's articulated "legitimate, nondiscriminatory reason", *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093, for discharging Montana was that it eliminated her position in restructuring and centralizing its personnel department at its corporate headquarters in Rochester. Montana sought to show that this avowed reason for her termination was pretextual, but the district court held that she failed to raise a triable issue of pretext. We disagree. We note initially that Montana was not required

to show that age was the only factor in First Federal's decision. *Hagelthorn v. Kennecott Corp.*, 710 F.2d at 82; *Geller v. Markham*, 635 F.2d at 1035. Nor was she required to show that First Federal's proffered reason was false, but only that its stated reason was not the only reason and that her age did make a difference. *Hagelthorn*, 710 F.2d at 82.

When viewed in the light most favoraable to her, Montana's evidence was sufficient to defeat summary judgment. First, at the time of her discharge, Montana was the oldest and highest paid nonclerical employee in First Federal's personnel department. Second, she was the only department head whose position was consolidated into the corporate headquarters at Rochester and whose staff continued without her. Third, she was not offered the opportunity to transfer to Rochester. Fourth, after her termination, her duties were not eliminated; instead the bulk of her duties were reassigned to a coworker, Rossi, who was thirty years younger. Even before assuming these added responsibilities, Rossi had worked overtime on a regular basis. By taking on Montana's responsibilities, Ms. Rossi's workload increased by 15-20 percent. Moreover, because these additional duties overburdened Rossi, many of her duties were subsequently distributed to another younger, newly hired personnel employee. Fifth, when First Federal took over the personnel functions of its wholly owned subsidiary, HWD, and created the position of compensation analyst, it failed even to consider Montana for that position although she was qualified for it. Finally, after Montana's discharge, purportedly as part of a reduction in force, First Federal increased the number of employees in its personnel department by three, adding the positions of compensation analyst, assistant compensation analyst, and pension administrator. Still, Montana was neither offered a position nor even considered for those positions.

When viewed together, these circumstances create a genuine factual issue as to whether First Federal's stated reason for terminating Montana – the centralization of its personnel department in Rochester and accompanying reduction in force – was pretextual and, thus, as to whether age was a factor in First Federal's decision to terminate Montana. Summary judgment was, therefore, inappropriate.

We further note that the district court seems to have attached undue significance to First Federal's claim that it merely exercised a good faith business judgment in terminating Montana. Certainly the court could not merely substitute its judgment for that of a business judgment, nor could it determine that First Federal should more properly have released another instead of Montana. *See Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (the ADEA "was not intended as a vehicle for judicial review of business decisions"); *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983). But where, as here, the plaintiff claims not that her employer used poor business judgment in discharging her but that her employer used the structural reorganization as a cover for discriminatory action, a federal court, to ensure that the business decision was not discriminatory, is not forbidden to look behind the employer's claim that it merely exercised a business decision in good faith. As the seventh circuit noted in *Graefenhain* v. *Pabst Brewing Co.*, 827 F.2d 13, 21 n.8 (7th Cir. 1987):

MEMORANDUM AND ORDER OF GLASSER, U.S.D.J.
DATED MAY 31, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANGELO J. SOLIMINO,

Plaintiff,

-against-

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant.
----------X

85 Civ. 0555

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

In this action brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, defendant moves pursuant to Fed. R. Civ. P. 56(b) for summary judgment on the grounds that (1) the action is time-barred, and (2) plaintiff is administratively estopped from proving his case. For the reasons stated below, the court grants defendant's motion on the latter ground.

FACTS

Plaintiff joined defendant Astoria Federal Savings & Loan as a teller in October 4, 1945. On March 5, 1982, he was terminated. By that time, he was 63 years old and had reached the position of Vice President of the Mortgage Origination Department.

Plaintiff filed a formal charge of age discrimination with the federal Equal Employment Opportunity Commission (EEOC)

and the New York State Division of Human Rights (DHR) on March 18, 1982. DHR held an investigative hearing on November 29, 1982. DHR dismissed the complaint on January 25, 1983, and the State Human Rights Appeal Board affirmed on May 30, 1984.

On July 29, 1983, prior to the Appeal Board's affirmance, plaintiff brought an action in New York State Supreme Court for New York County, naming as defendants several officers and employees of the defendant, the defendant's law firm, and two employees of the DHR. Justice Dontzin construed the complaint as alleging causes of action for wrongful termination of employment, prima facie tort, perjury and conspiracy, and dismissed the entire complaint as against the non-DHR defendants, pursuant to N.Y. Civ. Prac. L. & R. § 3211(a)(7), for failure to state a cause of action. *Solimino* v. *Drewitz*, No. 22074/83 (Sup.Ct.N.Y.Co. April 16, 1984). Subsequently, Justice Myers dismissed the complaint as against the DHR defendants pursuant to N.Y. Civ. Prac. L. & R. § 3211(a)(7) for failure to state a cause of action. *Solimino* v. *Drewitz*, No. 22074/83 (Sup.Ct.N.Y.Co. May 10, 1984). The Appellate Division affirmed both rulings. *Solimino* v. *Drewitz*, No. 23283-84 (1st Dep't May 7, 1985).

On February 21, 1985, plaintiff filed this action, alleging that defendant had begun to discriminate against him on the basis of age after he turned 56 by denying him salary increases and promotions and by promoting younger people over him, and that defendant had terminated him because of his age.

DISCUSSION

I. STATUTE OF LIMITATIONS

The ADEA's statute of limitations, 29 U.S.C. § 626(e)(1), incorporates by reference the statute of limitations contained in 29 U.S.C. § 255(a), which states in relevant part that an action is

> forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

For the purposes of this motion only, defendant concedes the applicability of the three-year limitations period based on a "willful violation" of the ADEA.

Plaintiff claims that his cause of action accrued on the date he was terminated, March 5, 1982, so that his filing of the complaint on February 21, 1985 was timely. However, the case law uniformly rejects this contention. Rather, plaintiff's cause of action accrued on the date he was notified of his impending termination. *Russo* v. *Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 42 (2d Cir. 1988); *Shockley* v. *Vermont State Colleges*, 793 F.2d 478, 481 (2d Cir. 1986); *Miller* v. *International Telephone & Telegraph Corp.*, 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985); *Pfister* v. *Allied Corp.*, 539 F. Supp. 224 (S.D.N.Y. 1982); *E.E.O.C.* v. *Kimberly-Clark Corp.*, 531 F. Supp. 58 N.D.Ga. 1981).[1]

The parties agree that plaintiff was notified of his impending termination in a meeting with defendant's president, Henry Drewitz, which occurred sometime soon after a meeting of defendant's board of directors held on Wednesday, February 17, 1982.[2]

However, a factual dispute exists over whether plaintiff's meeting with Drewitz occurred on the Thursday or Friday after the board meeting (February 18 or 19, 1982), in which case the action is time-barred, or on the following Monday (February 22, 1982), in which case the action is timely-filed.

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[1] The basis for the decisions cited on this point is to be found in two Supreme Court rulings: *Delaware State College* v. *Ricks*, 449 U.S. 250, 258-59 (1980) (limitations period in suit under § 1981 and Title VII ran from date tenure decision was made and plaintiff was notified) and *Chardon* v. *Fernandez*, 454 U.S. 6, 7 (1981) (per curiam) (limitations period in § 1983 suit ran from date plaintiffs received termination letters).

[2] The date of the board meeting is undisputed. The minutes of the board meeting, dated 2/17/82, are annexed as Exhibit A to Affidavit of Plaintiff Angelo J. Solimino, In Opposition to Motion for Summary Judgment.

Defendant relies principally upon the Charge of Discrimination form which plaintiff filed with the EEOC and the New York State Division of Human Rights on March 18, 1982 – no more than a month after the meeting with Drewitz. On that form, plaintiff put down February 18, 1982 as the "date most recent or continuing discrimination took place." Below that line of the form, in the narrative portion, plaintiff stated "I have been given a notice of termination on February 18, 1982[.]" The form was signed under penalty of perjury.

During the investigatory hearing before the State Division of Human Rights on November 29, 1982 – over nine months after the Drewitz meeting – Drewitz testified that the meeting occurred on February 19, 1982. Tr. 27-28. Solimino's testimony conflicted in several respects with Drewitz's, but did not contradict Drewitz's recollection regarding the date. *Id.*, 29-30. However, Solimino later referred to a meeting with Drewitz – apparently the same meeting – as having occurred on a Monday afternoon. Tr. 66.[3] The first Monday after the February 17, 1982 board meeting was February 22, 1982. If that date or any date thereafter were correct, the action would be timely-filed.

Unlike the foregoing evidence, the rest of plaintiff's evidence on the statute of limitations issue dates from a time after this suit was filed, so that plaintiff's statements may reflect an awareness that his entire lawsuit was in danger of being dismissed as untimely.

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[3] While Mr. Solimino's prior consistent statement might be inadmissible hearsay, the hearing transcript in which it appears was attached to *defendant's* moving papers, and defendant sought no evidentiary ruling on its admissibility. Consequently, it is not error for the court to consider it on motion for summary judgment. *In re Teltronics Services*, 762 F.2d 185, 192 (2d Cir. 1985) (party opposing summary judgment waived objections to affidavits not made on personal knowledge by not motioning the district court to strike them); *Walker* v. *Wayne County, Iowa*, 850 F.2d 433, 435 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 791 (1989) (same with respect to affidavits containing hearsay); *Williamson* v. *United States Department of Agriculture*, 815 F.2d 368, 383 (5th Cir. 1987) (same).

At his December 1, 1988 deposition in connection with this lawsuit, Solimino steadfastly maintained that the meeting with Drewitz occurred on Monday, February 22, 1982 (Solimino Dep. 112, 117), although he also affirmed that every statement made on his Charge of Discrimination form was correct. Solimino Dep. 85-86.[4]

Finally, in connection with this motion, plaintiff has submitted his own affidavit and that of his wife. The affidavits allege that the meeting with Drewitz occurred on Monday, February 22, 1982.

In considering this motion for summary judgment, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight* v. *U. S. Fire Insurance Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) (citations omitted). Summary judgment is inappropriate where, as here, a factual dispute exists as to the accrual date of a cause of action, and resolution of that dispute will determine whether or not the action is time-barred. *Telectronics Proprietary, Ltd.* v. *Medtronic, Inc.*, 687 F. Supp. 832, 844 (S.D.N.Y. 1988). *See also Helm* v. *South African Airways*, No. 84 Civ. 5404 (S.D.N.Y. June 25, 1987) (1987 U.S. Dist. LEXIS 5671) (in action under ADEA, fact dispute over date action accrued precluded summary judgment on statute of limitations grounds); *Hawley* v. *L. B. Smith, Inc.*, No. 82 Civ. 6372-CSH (S.D.N.Y. Feb. 25, 1985) (LEXIS, Genfed library, Dist. file) (same); *United States* v. *Becker*, No. 86 Civ. 3946 (S.D.N.Y. April 4, 1989) (1989 U.S. Dist. LEXIS 3227) (fact dispute over date on which tax assessment was made precluded summary judgment on statute of limitations grounds).

Accordingly, this ground for defendant's motion is rejected.

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[4] The court rejects defendant's contention that plaintiff's deposition testimony at 117-18 is an admission that the February 18, 1982 notice of termination date on the Charge is correct. Clearly, plaintiff merely voiced approval of the *March* 18, 1982 date stamped on the face of the Charge, indicating when it was received.

II. ADMINISTRATIVE ESTOPPEL

Defendant argues that the unreviewed[5] decision of the New York State Division of Human Rights ("DHR") denying plaintiff's age discrimination claim has preclusive effect in this federal court action. Plaintiff disputes this, and argues alternatively that even if this were true, the DHR hearing did not meet constitutional standards of due process and therefore provides no basis for administrative estoppel.

The court agrees that the DHR hearing, although unreviewed by the state courts, has preclusive effect in this federal court action.

No Supreme Court or Second Circuit opinion deals with the question whether a state agency's unreviewed rejection of an age discrimination claim has preclusive effect in a subsequent federal court action brought under the ADEA. However, two Courts of Appeal have dealt expansively with the issue, reaching opposite conclusions. *Duggan* v. *Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) (unreviewed agency decision not preclusive); *Stillians* v. *State of Iowa*, 843 F.2d 276 (8th Cir. 1988) (unreviewed agency decision preclusive).[6]

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[5] The court does not view plaintiff's state court action as having sought or obtained judicial review of DHR's findings as to his age discrimination claim. *See* "FACTS," *supra*.

[6] Other opinions dealing with this issue do so only in *dicta*, or contribute little to the analyses contained in *Duggan* and *Stillians*. The Ninth Circuit found administrative estoppel unavailable on the facts of the case before it in *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282-84 (9th Cir. 1986), but apparently assumed, without analysis, that unreviewed state agency findings could be preclusive in a federal ADEA suit. The Eleventh Circuit found administrative estoppel unavailable on the facts of the case before it in *Delgado* v. *Lockheed Georgia Co.*, 815 F.2d 641, 646 (11th Cir. 1987), but expressed the view in *dicta* that unreviewed state agency findings should *not* be entitled to preclusive effect in federal ADEA suits. *See also Frank* v. *Capital Cities Communications, Inc.*, 689 F. Supp. 334 (S.D.N.Y. 1988) (declining to reach issue where preclusion not available on the facts at bar). The court in *Ibrahim* v. *New York State Department of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988) adopted the Seventh Circuit's reasoning in *Duggan*, holding that unreviewed state agency findings are not preclusive in federal ADEA suits. Other decisions rendered prior to the Supreme Court's important decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986) need not be discussed.

The conflicting rulings in *Stillians* and *Duggan* reflect divergent interpretations of the Supreme Court's decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986). *Elliott* held that an unreviewed state agency determination was not binding on a federal court with respect to a Title VII claim, but was binding with respect to a claim under 42 U.S.C. § 1983.

As to the Title VII claim, the Court's holding turned on a Title VII provision, 42 U.S.C. § 2000e-5(b), requiring the EEOC to give "substantial weight" to prior state proceedings. The Court noted that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." *Id.*, 478 U.S. at 795 (citing *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 470 n.1 (1982)).[7] Because of the inconsistency between according state agency findings "substantial weight" and according them preclusive effect, the Court concluded that Congress did not intend for state agency findings to bind a federal court in a Title VII suit.

However, with respect to plaintiff's § 1983 claim, the Court reached the opposite conclusion because it found that — in contrast with Title VII — nothing in the language or legislative history of § 1983 "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797 (quoting *Allen* v. *McCurry*, 449 U.S. 90, 97 (1980)). Observing that it had already approved the concept of administrative estoppel in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), and that administrative estoppel served the same "unifying" function as the Constitution's Full Faith and Credit Clause, the Court held that, absent a showing of contrary Congressional intent, "when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact before it which the parties have had adequate opportunity to litigate,' . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Id.*, 478 U.S. at 799 (quoting *Utah Construction*, 384 U.S. at 422).

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[7] The Court also observed that it had already held in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) that a *federal* agency's rejection of an employment discrimination claim had no preclusive effect in a subsequent Title VII suit. *Id.*

Thus, *Elliott* teaches that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to "contravene the common-law rules of preclusion[.]" *Id.*, 478 U.S. at 797. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.

That is precisely the way the Eighth Circuit read *Elliott* in its *Stillians* opinion. *Stillians* expanded upon the concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident:

> When interpreting a statute we should not forget what existed before it was enacted. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection*, 474 U.S. 494, 106 S. Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen* v. *Johnson*, 343 U.S. 779,p 783, 72 S. Ct. 1011, 1014, 96 L.Ed. 1294 (1952).

Id., 843 F.2d at 280-81 (brackets and ellipses in the original).

Stillians cautioned that, in determining whether a "statutory purpose" to displace common-law rules of preclusion is "evident," courts must set aside their own legislative and policy preferences and look solely to Congressional intent:

> Thus, the most important lesson to be learned from *Elliott* is that when a federal statute does not specifically address a particular issue, in order to

> decide that issue we must ascertain Congressional intent. Title VII claims are not precluded [by unreviewed state agency findings] because the Court found evidence that Congress intended that result. Likewise, traditional rules of preclusion were left untouched by 42 U.S.C. § 1983 because that was the intent of Congress.
>
> Ascertaining Congressional intent is often a difficult endeavor. When a statute does not speak on an issue and the legislative history is silent, we are forced to decide between two conflicting results. Our decision should not be based on our opinion of what direction the statute should take. If the result intended by Congress seems inconsistent with the overall objectives of the statute, so be it. Only Congress legislates and only Congress can amend.

Id., 843 F.2d at 280.

The opinion in *Stillians* went on to hold, in essence, that the presumption favoring retention of common-law rules of preclusion had not been rebutted where the ADEA's language and legislative history gave no indication of Congress's intent regarding the preclusive effect of unreviewed state findings. In reaching that conclusion, the Eighth Circuit found the ADEA's lack of any provision like § 2000e-5(b) highly probative, although not dispositive:

> One of the major factors in the Supreme Court's reasoning in *Elliott* was [42] U.S.C. § 2000e-5(b) which provides, in part, that the EEOC must "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 106 S. Ct. at 3225. Because giving substantial weight is inconsistent with giving preclusive effect, the Court had some indication of Congressional intent to guide it.

> We believe that the absence of a similar provision from the ADEA goes far toward resolving the issue before us. While we may not wish to imply Congressional intent from the absence of a similar provision, the applicability of *Elliott* to the present case certainly is weakened by its absence. When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar.

Id., 843 F.2d at 281-82.

The court also reasoned that denying preclusive effect to state agency findings would reduce state agency proceedings to little more than a dress rehearsal for a subsequent federal suit under the ADEA:

> For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738 [requiring federal courts to give state court judgments the same preclusive effect they would have in state court], or filing suit anew in the federal district court. Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation.

Id., 843 F.2d at 282.

The Seventh Circuit, reaching the opposite conclusion in *Duggan*, construed the Supreme Court's decision in *Elliott* as

requiring it to "determine whether there are enough parallels between Title VII and the ADEA to justify" the inference that, in drafting the ADEA, Congress meant to reject administrative estoppel. *Id.*, 818 F.2d 1294. In comparing the two statutory schemes, the Seventh Circuit – quite unlike the Supreme Court in *Elliott* – decided to focus on their respective "deferral mechanisms," meaning the statutory provisions giving the appropriate state agency a "limited opportunity to consider [the claim] before the federal machinery can be set in motion." *Id.*, 818 F.2d at 1295.

First, the court noted that the deferral mechanisms of both Title VII and the ADEA support an inference that state agency findings are not entitled to deference. For example, both statutes permit state agency determinations to be superceded by federal agency action – after 60 days under Title VII, or by filing a claim directly with the EEOC under the ADEA. *Id.*, 818 F.2d at 1295-96 (citing Title VII, 42 U.S.C. § 2000e-5(c) and the ADEA, 29 U.S.C. § 633(b)). Under both statutes, concurrent or subsequent EEOC investigations would be rendered superfluous if the state agency findings had preclusive effect. Furthermore, the court found it "anomalous" to conclude that state agency findings should have preclusive effect when EEOC findings do not. *Id.*, 818 F.2d at 1295 (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973)).[8]

Second, the court found that, to the extent that the ADEA's deferral mechanisms differed from Title VII's, the differences indicate that, "if anything, less deference is due state proceedings

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[8] The Supreme Court made the same observation in *dicta* in *Kremer Construction Corp.*, 456 U.S. at 470 n.1, and this *dicta* became the basis of the Sixth Circuit opinion affirmed by the Supreme Court in *Elliott*. *See Elliott*, 478 U.S. at 793. However, as previously discussed, the Court's opinion in *Elliott* appeared to rely upon the inconsistency between the "substantial weight" standard of § 2000e-5(b) and the total preclusion available under common law. The Court did not reiterate or appear to rest its decision upon *Kremer*'s statement in *dicta* that Congress would not have afforded state agency proceedings preclusive effect while denying such effect to EEOC findings.

under the ADEA than under Title VII." *Id.*, 818 F.2d at 1296. Because the filing of a federal ADEA action stays any state proceedings, the ADEA — unlike Title VII — never affords the state agency a period of exclusive jurisdiction. *Id.*, 818 F.2d 1296 (citing 29 U.S.C. § 633(a)). Moreover, under the ADEA — unlike Title VII — the claimant can file charges with the EEOC and the state agency simultaneously. *Id.*, 818 F.2d at 1295-96 (citing 29 U.S.C. § 633(b)).

Third, the court addressed what it conceded to be the employer's "strongest argument": namely, that the Supreme Court in *Elliott* focused on Title VII's "substantial weight" provision, § 2000e-5(b), and not on the structure of Title VII's deferral mechanisms, in determining that Congress intended to displace the common law of preclusion in enacting the ADEA. The Seventh Circuit stated that § 2000e-5(b) "is simply the most obvious piece of evidence that administrative *res judicata* does not operate in a Title VII suit. Thus, it is not surprising that the Court in *Elliott* heavily relied on this provision. The absence of a comparable section in the ADEA is certainly not fatal to [plaintiff]." *Id.*, 818 F.2d at 1296.[9]

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[9] Relying on a footnote in *Kremer*, the Seventh Circuit noted that the legislative history of the 1972 amendments to Title VII indicates that Congress added the "substantial weight" provision of § 2000e-5(b) in order to *increase* the EEOC's deference to state agency findings, which the EEOC previously had been free to ignore. The court concluded that it would be "far-fetched" to construe the ADEA's *lack* of a provision *increasing* deference to state agency findings as indicating that Congress intended to give preclusive effect to such findings. *Id.*, 818 F.2d at 1297 (citing *Kremer*, 456 U.S. at 470 n.8).

It is true, as the Seventh Circuit observed, that in *Kremer*, the Supreme Court invoked this bit of legislative history to find that Title VII's "substantial weight" provision could not have implicitly repealed a federal statute (28 U.S.C. § 1738) granting state court judgments "full faith and credit" in federal court. However, in the same footnote, the Court found it "even more implausible" to find an implied repeal of § 1738 in Title VII's *deferral* provision, 42 U.S.C. § 20000e-5(c) — the very provision upon which the Seventh Circuit's analysis largely turns. *Kremer*, 456 U.S. at 470 n. 8.

(Footnote continued)

The Seventh Circuit's opinion depends upon its debatable assumption that the Supreme Court in *Elliott* became so thoroughly distracted by "the most obvious piece of evidence" — *i.e.*, the "substantial weight" provision contained in § 2000e-5(b) — that it failed to articulate the true basis of its decision — *i.e.*, the lack of deference implicit in the structure of Title VII's "deferral mechanisms." This court will not make that assumption. The Supreme Court is capable of articulating its reasoning and its reasoning in *Elliott* is clearly articulated.

Furthermore, the Seventh Circuit's opinion improperly conflates the issues of "deferral" and "preclusion." The Supreme Court has not been receptive to similar attempts to read more into the deferral provisions of Title VII and the ADEA than the structure and purpose of those provisions will support. *See Kremer*, 456 U.S. at 470 n.1 (it would be "implausible" to find that Title VII's deferral provision implicitly repealed the federal statute granting state court judgments preclusive effect in federal court when "that [deferral] provision does not even address the issue of the proper weight to be afforded state decisions"); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-57 (1979) (rejecting argument that differences between deferral provisions of Title VII and ADEA indicated that "the ADEA pays less deference to state agencies and that, as a consequence, ADEA claimants have the option to ignore state remedies").

Deferral and preclusion are not equivalent in effect or purpose. Deferral mechanisms simply give the state agency the "first crack" at the claim. Preclusion, in contrast, gives the state agency the "last word" on the claim in a limited class of cases (*i.e.*, those in which the state agency rules within 60 days, or rules after 60 days but before the claimant files a federal action. *See*

In short, *Kremer* features language inconsistent with the reasoning of *both* the Seventh and Eighth Circuits. Moreover, its reading of § 2000e-5(b) is manifestly inconsistent with *Elliott's* reading of the same provision. Since *Kremer* is not as recent as *Elliott*, and since *Kremer* involved the preclusive effect of a state *court* judgment under § 1738 rather than the preclusive effect of an unreviewed state agency finding under the federal common-law rules of preclusion applicable here, the court will be guided by *Kremer* only where it is consistent with *Elliott*. *See Elliott*, 478 U.S. at 794.

29 U.S.C. § 633(a) and (b)). Deferral "is intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Evans*, 411 U.S. at 756. While preclusion, like deferral, helps conserve judicial resources, it "also serves the value of federalism," and, like the Constitution's Full Faith and Credit clause, "'act[s] as a nationally unifying force.'" *Elliott*, 478 U.S. at 798-99 (quoting *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 289 (1980) (White, J., concurring in judgment)). Thus, preclusion serves a more important value than deferral, and statutory deferral mechanisms are not an accurate indicator of Congressional intent to displace common-law rules of preclusion.

Rather than comparing the ADEA's deferral mechanisms to those in Title VII, the proper inquiry under *Elliot* is whether or not any provision of the ADEA evinces a Congressional intent to "contravene the common-law rules of preclusion[.]" *Elliott*, 478 U.S. at 797; *accord Stillians*, 843 F.2d at 281[10] More specifically, the approach taken by the Supreme Court in *Elliott* dictates that the court examine the ADEA to see whether it contains any provision – like the "substantial weight" provision of Title VII – which addresses the issue of the proper weight to be afforded state agency findings, and which accords such findings something less than preclusive effect.

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[10] The Eighth Circuit recognized this in *Stillians* when it rejected the Seventh Circuit's methodology of "reason[ing] by analogy" from the provisions of Title VII:

> Comparing the ADEA with Title VII and 42 U.S.C. § 1983 [as the Seventh Circuit did in *Duggan*] does not address the ultimate issue whether Congress intended to abrogate traditional rules of preclusion when it enacted the ADEA. Even if the ADEA more closely parallels Title VII and § 1983, if Congress did not intend to abrogate preclusion when it enacted the ADEA, then preclusion should still apply. We should not reason by analogy when interpreting statutes. The proper analysis is to examine the ADEA on its own rather than merely compare and contrast it with Title VII.

Id., 843 F.2d at 281 (footnote omitted).

The court finds no such provision in the ADEA. Moreover, had Congress wanted to demonstrate an intent to displace the common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII. As the Eighth Circuit stated in *Stillians*, "[o]nly Congress legislates and only Congress can amend." *Id.*, 843 F.2d at 280. This court would be implicitly amending the ADEA if it were to hold that the ADEA displaces common-law rules of preclusion. The court declines to do this. Rather, following *Elliott* and *Stillians*, it will adhere to the presumption that state findings – including unreviewed state agency findings – can have preclusive effect in an ADEA action in federal court.

This result does not denigrate the important right protected by the ADEA. The Supreme Court in *Elliott* found that unreviewed state agency findings have preclusive effect even in cases brought under 42 U.S.C. § 1983 to vindicate fundamental liberty and property rights guaranteed by the Constitution. There is no reason to suppose that a right created by statute should be accorded greater solicitude, absent a showing of a Congressional intent to the contrary.

The court also rejects plaintiff's argument that the hearing afforded him by the state agency failed to meet the requirements of constitutional due process.

The elements of administrative estoppel are:

1) the agency was acting in a judicial capacity;

2) the disputed issues of fact were properly before the agency and the parties were given an adequate opportunity to litigate them; and

3) the courts of that particular state would give the agency's factfinding determinations preclusive effect. *Elliott*, 478 U.S. at 797-98 (quoting *Utah Construction*, 384 U.S. at 422); *Kirkland* v. *City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987).

The agency obviously was acting in a judicial capacity, and the court's independent reading of the hearing transcript persuades it that the parties – each of whom were represented by counsel – had adequate opportunity to litigate the factual disputes resolved by the agency. Moreover, the Supreme Court has confirmed the constitutional adequacy of a virtually identical procedure used by the same New York agency to adjudicate employment discrimination charges. *Kremer*, 456 U.S. at 479-85; *accord Kirkland*, 828 F.2d at 107-09. Finally, the Second Circuit has held that New York state courts would give preclusive effect to a DHR hearing. *Kirkland*, *supra*. *See also Brugman* v. *City of New York*, 102 A.D.2d 413, 477 N.Y.S.2d 636 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 1011, 489 N.Y.S.2d 54, 478 N.E.2d 195 (1985). Thus, all the elements of administrative estoppel have been satisfied here.

Having determined that unreviewed state agency findings can have preclusive effect in a federal ADEA suit, and that the unreviewed state agency finding in this case is entitled to such deference, all that remains is to determine the effect of those findings on plaintiff's cause of action under the ADEA. The state agency found the following facts:

> The record considered as a whole does not support complainant's allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports respondent's position that complainant was terminated because the position of Vice President which complainant held was eliminated due to the low volume of work performed by respondent's Mortgage Origination Department. There is no evidence in the file that complainant's age was a factor in his termination.

Determination and Order After Investigation, annexed as Exhibit 6 to the Moving Affidavit of Anthony H. Atlas.

Since these findings bind this court, the plaintiff cannot prove his claim under the ADEA that his employer "discharge[d him]

or otherwise discriminate[d] against [him] with respect to his compensation, terms, conditions, or privileges of employment, because of [his] age[.]" 29 U.S.C. § 623 (a)(1).

Accordingly, defendant's motion for summary judgment is granted.

SO ORDERED,

/s/ I. Leo Glasser
United States District Judge

Dated: Brooklyn, New York
May 31st, 1989

JUDGMENT DATED JUNE 2, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

ANGELO J. SOLIMINO,

Plaintiff,

-against-

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant.
----------x

JUDGMENT

CV 85-0555 (ILG)

A memorandum and order of Honorable I. Leo Glasser, United States District Judge, having been filed on June 2, 1989 granting defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) on the ground that plaintiff is administratively estopped from proving his case, it is

ORDERED and ADJUDGED that plaintiff take nothing of defendant; and that defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) is granted on the ground that plaintiff is administratively estopped from proving his case.

Dated: Brooklyn, New York
June 2, 1989

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

EXCERPTS FROM NEW YORK HUMAN RIGHTS LAW

§ 297. **Procedure**

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The industrial commissioner or the attorney-general or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

3. a. If in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain

from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the division and the respondent, including a provision for the entry in the supreme court in any county in the judicial district where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, of a consent decree embodying the terms of the conciliation agreement. The division shall not disclose what has transpired in the course of such endeavors.

b. If the respondent and the division agree upon conciliation terms the division shall serve upon the complainant a copy of the proposed conciliation agreement. If the complainant agrees to the terms of the agreement or fails to object to such terms within fifteen days after its service upon him, the division shall issue an order embodying such conciliation agreement. If the complainant objects to the agreement he shall serve a specification of his objections upon the division within such period. Unless such objections are met or withdrawn within ten days after service thereof, the division shall notice the complaint for hearing.

c. Notwithstanding any other provisions of this section, the division may, where it finds the terms of a conciliation agreement to be in the public interest, execute such agreement, and limit the hearing to the objections of the complainant. If, however, the divison finds that the complainant's objections to the proposed conciliation agreement are without substance or that noticing the complaint for hearing would be otherwise undesirable, the division may in its unreviewable discretion, at any time prior to a hearing before a hearing examiner dismiss the complaint on the grounds of administrative convenience.

d. If a conciliation agreement is entered into, the division shall serve a copy of the order embodying such agreement upon all parties to the proceeding, and if a party to any such proceeding is a regulated creditor, the division shall forward a copy of the order embodying such agreement to the superintendent.

4. a. Within two hundred seventy days after a complaint is filed, or withing one hundred twenty days after the board has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the dvision has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented soleiy by his attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be bound

by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

b. If the respondent fails to answer the complaint, the hearing examiner designated to conduct the hearing may enter the default and the hearing shall proceed on the evidence in support of the complaint. Such default may be set aside only for good cause shown upon equitable terms and conditions.

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint; (iii) awarding of compensatory damages to the person aggrieved by such practice; (iv) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (v) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such

respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

d. The division shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.

5. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

6. At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or if the complaint alleges an unlawful discriminatory practice under subdivision three or paragraphs (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a

temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show case, and after affording all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper. In the event that the complaint is dismissed by final order of the division or a court, the respondents shall be entitled to such remedies as are prescribed in section twenty-five hundred twelve of the civil practice law and rules.

7. Not later than one year from the date of a conciliation agreement or an order issued under this section, and at any other times in its discretion, the division shall investigate whether the respondent is complying with the terms of such agreement or order. Upon a finding of non-compliance, the division shall take appropriate action to assure compliance.

8. No officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a.

L.1951, c. 800; amended L.1952, c. 285, § 7; L.1960, c. 978; L.1961, c 414, § 5; L.1962, c. 164, § 2; L.1962, c. 310, § 134; L.1962, c. 369, § 3; L.1962, c. 529; L.1965, c. 4 § 2; L.1965, c. 851, § 4; L.1968, c. 10, § 2; L.1968, c.958, § 6; L.1969, c. 218; L.1969, c. 359, §§ 9, 10; L.1969, c. 1070, § 2; L.1970, c. 316; L.1974, c. 27, § 2; L.1974, c. 173,§§ 7-9; L.1977, c.729, §§ 1, 2.

§ 297. **Procedure (As Amended)**

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney-general, or the chairman of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney-general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

[See main volume for text of 2 and 3]

4. a. [Eff. until June 30, 1994.] (i) Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the court has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer

the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, the commissioner of human rights shall establish a voluntary arbitration procedure in cooperation with the New York state human rights arbitration advisory committee. The commissioner shall promulgate rules and regulations to enable complainants and respondents to voluntarily submit disputes

to impartial arbitration. The division shall fully notify complainants and respondents eligible to elect arbitration of their rights and responsibilities, including limitations on their right of appeal. All information provided shall be in or be accompanied by an explanation in plain English or other languages as necessary. The arbitration program shall be administered by the American Arbitration Association and the arbitrator shall be selected from the panel of arbitrators established by such association. A submission to arbitration shall divest the commissioner of further jurisdiction over the matter and the determination of the arbitrator shall be final, subject only to review in accordance with article seventy-five of the civil practice law and rules. The cost of such arbitration shall not be borne by the division but shall be provided for by the rules and regulations of the commissioner. The commissioner is authorized to apply for and receive such grant monies as may be available to support the arbitration program.

[See main volume for text of b to d and 5]

6. At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, of if the complaint alleges an unlawful discriminatory practice under subdivision two-a or paragraph (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, or, if no supreme court justice is available in such county, in any other county within the judicial district, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording all parties an opportunity to be heard, if the court deems it

necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant apropriate injunctive relief upon such terms and conditions as it deems proper.

[See main volume for text of 7 to 9]

(As amended L.1982, c. 863, § 1; L.1984, c. 83 § 1; L.1984, c. 266, § 1; L.1989, c. 568, § 1.)

§ 297-a. State human rights appeal board

1. There is hereby created in the executive department a state human rights appeal board, in this article referred to as the board, consisting of a chairman and three members appointed by the governor, by and with the advice and consent of the senate. No more than two members shall be from the same political party.

2. The governor shall appoint a chairman, to serve as the chief executive officer of the board, and who shall hold office at the pleasure of the governor. The chairman of the board shall have the power and the duty to assign members appropriate functions as may be needed to promote the efficient transaction of the business of the board and to appoint such employees and agents as he may deem necessary, fix their compensation within the limitations provided by law and prescribe their duties.

3. The terms of office of the present members of the board shall expire on June thirtieth, nineteen hundred seventy-five. Thereafter, the term of a member shall be six years, provided, however, that of those members first appointed on or after the effective date of this act, one shall be appointed for a term of four years and two for terms of six years, from July first, nineteen hundred seventy-five. A member chosen to fill a vacancy otherwise than by expiration of a term shall be appointed for the unexpired term of the member whom he is to succeed.

4. Appeals shall be heard by the chairman or one member of the board and a majority vote of the board, including the

chairman and the members, shall be necessary for a determination of such appeal. Said determination shall be made within two hundred seventy days of the filing of a notice thereof.

5. The chairman and each member shall be an attorney, admitted to practice before the supreme court. The members of the board shall receive the sum of one hundred fifty dollars per day when rendering service as members, provided that the aggregate of such fees to any one member is any one fiscal year shall not exceed an amount established and approved by the director of the budget. The chairman and each member shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of their official duties. A member may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

6. The board shall have power, and it shall be its duty:

a. To meet and function at any place within the state;

b. To adopt, promulgate, amend and rescind suitable procedural rules with respect to the functioning of the board and the setting of time limits for hearing of appeals and the rendering of decisions thereon;

c. To hear appeals by any party to any proceeding before the division from all orders of the commissioner issued pursuant to this article, provided such appeals are commenced by filing with the board of a notice of appeal within fifteen days after service of such order;

d. To receive briefs, and, where the board deems it advisable, to hear oral argument with respect to such appeals;

e. To require the submission to it from the division of an original or certified copy of the entire record on which any order appealed from is based, which record need not be reproduced;

f. To stay the effectiveness of any order of the commissioner pending the determination of an appeal in proper cases and on such terms and conditions as the board may require.

7. The board may affirm, remand or reverse any order of the division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is:

a. in conformity with the constitution and laws of the state and the United States;

b. within the division's statutory jurisdiction or authority;

c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;

d. supported by substantial evidence on the whole record; or

e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The division shall be bound by the decision of the board except to the extent such decision is reversed or otherwise modified by a court of competent jurisdiction pursuant to this article.

Added L.1968, c. 958, § 7; amended L.1969, c. 368; L.1971, c. 675; L.1975, c. 334, § 1; L.1977, c. 729, § 3.

[§ 297-a. Repealed. L.1984, c. 83, § 2, eff. June 1, 1984]

(4)

No. 89-1895

Supreme Court, U.S.
FILED
FEB 20 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI
FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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* *Counsel of Record*

PETITION FOR WRIT OF CERTIORARI FILED MAY 30, 1990
CERTIORARI GRANTED JANUARY 7, 1991

QUESTION PRESENTED FOR REVIEW

Whether, under this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), preclusive effect should be given to a judicially unreviewed state agency finding of no probable cause so as to bar a subsequent action in federal court under the Age Discrimination in Employment Act of 1967?

LIST OF PARTIES PURSUANT TO RULE 24.1(b)

The parties to the proceedings below were Petitioner, Astoria Federal Savings and Loan Association, and Respondent, Angelo J. Solimino. Briefs *amicus curiae* were filed in the Court of Appeals by the Equal Employment Opportunity Commission and the American Association of Retired Persons. Counsel for the parties and counsel for the Equal Employment Opportunity Commission presented oral argument to the Court of Appeals.

LISTING OF AFFILIATED ENTITIES PURSUANT TO RULE 29.1

Astoria Federal Savings and Loan Association has no parent company, but has the following wholly owned subsidiaries:

AF Equities Corp.
AF Staten Island Development Corp.
AF Roosevelt Avenue Corp.
AF Astoria Corp.
AF Woodside Corp.
AF Glen Cove Corp.
AF Cortland Corp.
AF Agency, Inc.

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CITATION OF THE OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 901 F.2d 1148 (2d Cir. 1990), and is reprinted in the Appendix to the Petition beginning at (A.11)[1] The opinion of the United States District Court for the Eastern District of New York is reported at 715 F.Supp. 42 (E.D.N.Y. 1989), and is reprinted in the Appendix at (A.14) and in its memorandum and order form at J.A. 141. The judgment of the District Court is reprinted in the Joint Appendix at J.A. 158.

STATEMENT OF GROUNDS OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on April 12, 1990. This Court exercised jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA") and the New York Human Rights Law, N.Y. Executive Law, §§ 290-301 (N.Y. McKinney's Consol. Laws 1982 & Supp. 1990). The pertinent sections of these statutes are reprinted in the Appendix to the Petition, at pages A.30-A.43. Sections 297 and 297-a of the New York Human Rights Law are reprinted in the Joint Appendix at J.A. 159-J.A. 170.

Pertinent portions of the ADEA cited in this brief are:

Section 14(a), 29 U.S.C. §633(a), which states:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.;

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[1] References preceded by an "A." are to page numbers of the Appendix to the Petition for Writ of Certiorari herein. References proceeded by "J.A." are to page numbers of the Joint Appendix herein.

Section 14(b), 29 U.S.C. § 633(b), which states:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.;

and, Section 7(d), 29 U.S.C. §626(d), which states:

> (d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed–
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

On March 5, 1982, Angelo J. Solimino ("Solimino"), then a Vice President of Petitioner, Astoria Federal Savings And Loan Association ("Astoria") in its Mortgage Origination Department, was terminated from that employment. He was 63 years old. (A.3; 901 F.2d at 1149).

Less than two weeks later, on March 18, 1982, Solimino filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was discriminated against because of his age when he was discharged. The EEOC referred the matter to the New York State Division of Human Rights pursuant to a worksharing agreement between the two agencies. Treating the case as a potential violation of both the ADEA and the State Human Rights Law, N.Y. Exec. L., §§ 290-301, which also bars age discrimination in employment, the New York State Division of Human Rights ("DHR") assigned the matter to a staff member for investigation. (A.3; *Id.*).[2]

On October 5, 1982, the DHR human rights specialist who investigated the matter issued her Investigation Report summarizing the positions of the parties and the evidence adduced in the matter up to that time. (J.A. 128). On November 29, 1982, she conducted a hearing (a so-called "fact finding conference") on the allegations in the charge. (A.3; J.A. 34). The hearing was attended by both parties and their counsel. At Solimino's request, witnesses presented by each party gave sworn testimony. (A.3; *Id.*). A stenographic shorthand reporter was present, also at Solimino's request, to record the proceeding. A transcript of approximately eighty pages resulted from the testimony of the

[2] The charge form which Solimino filed with the EEOC had the name of the "NYS Division of Human Rights" inserted just below the printed name of the Commission, and although it specifically alleged age discrimination, it did not cite either the ADEA or the State Human Rights Law as a basis for jurisdiction. Thus, it appears that the charge was intended to invoke simultaneously the respective jurisdictions of both agencies. The DHR's handling of the matter resulted in a consolidated, concurrent disposition of the case under federal and state laws. (J.A. 31-J.A. 33).

five witnesses (including Solimino and the president of Astoria) and the arguments of the parties' counsel. (J.A. 34-J.A. 88). Both sides had an opportunity to examine and cross-examine witnesses and present argument on behalf of their respective positions.

On January 25, 1983, after concluding its investigation, the DHR rendered its Determination and Order after Investigation, finding that no probable cause existed to believe that the alleged age discrimination had occurred and dismissing the complaint. (A.3; J.A. 89-J.A. 91; 901 F.2d at 1149). Solimino appealed to the State Human Rights Appeal Board. (J.A. 92-J.A. 94). On May 30, 1984, after giving Solimino the opportunity to submit a brief and to present oral argument, the Appeal Board affirmed the DHR's determination. (A.3-A.4; J.A. 95-J.A. 98).[3] Solimino never sought judicial review of the DHR's finding, although he had the right to do so under New York law. (A.4; *Id.*).

In a formal Notice accompanying its Order, the Appeal Board advised Solimino of his right to seek judicial review. (A.44; J.A. 95).[4]

On July 29, 1983, during the pendency of his appeal before the Appeal Board, Solimino began an action in New York State Supreme Court, New York County, against five Astoria officers, Petitioner's lawyers and two DHR employees, alleging wrongful termination, prima facie tort, perjury and conspiracy. While the allegations involved Solimino's discharge and his age

[3] The Appeal Board, a quasi-judicial appellate forum separate from the DHR, was abolished in 1985. Appeals from DHR orders dismissing a complaint are now taken to the New York State Supreme Court, at its trial-court level, for review to determine whether the findings of fact are "supported by sufficient evidence on the record considered as a whole." (N.Y. Human Rights Law, Exec. L. § 298, L. 1985, c.340, § 1. N.Y. Exec. L. § 297-a, which governed the Appeal Board, is reprinted at J.A. 168-J.A. 170).

[4] The Notice also cautioned aggrieved litigants:

> A complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his right to proceed subsequently in federal court under Title VII, by virtue of *Kremer v. Chemical Construction Company*, 456 U.S. 461 (1982).

(A.44; J.A. 95).

discrimination charge, this action did not specifically request judicial review of the DHR's findings. (A.4; 901 F.2d at 1145). The Supreme Court dismissed the complaint against some of the defendants on April 18, 1984, and as to the remaining defendants on May 10, 1984. (Copies of the State Supreme Court opinions are set out at J.A. 99-J.A. 105). The Appellate Division of the Supreme Court affirmed these dismissals a year later. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dept. 1985)(A.4; J.A. 106-J.A. 107).

On February 21, 1985, Solimino commenced this action against Astoria in the United States District Court for the Eastern District of New York, maintaining that Astoria Federal had discriminatorily denied him promotions and raises, and had discharged him, because of his age, in violation of the ADEA. (A.4). On February 23, 1989, Astoria moved for summary judgment on the grounds that it was untimely and that the DHR's prior judicially unreviewed finding that Solimino's treatment as an employee and termination did not result from age discrimination precluded Solimino's federal suit under the ADEA. (A.4; 901 F.2d at 1150).

The District Court granted Astoria's motion on grounds of administrative estoppel.[5] It agreed that the DHR hearing and determination, although unreviewed by the state courts, had a preclusive effect on Solimino's ADEA federal court action. (A.19). The District Court concluded that common law rules of preclusion applied to the DHR proceedings and that nothing in the ADEA overcame the presumptively preclusive effect of the state agency findings. (A.27-A.28). The Court also rejected Solimino's argument that the state agency hearing failed to meet the requirements of due process, and found that the DHR findings bound the Court. (A.28-A.29).

The Court of Appeals reversed. Persuaded from its review of the ADEA "that Congress intended that a finding of no discrimination by a state agency which has not been judicially

[5] It rejected that part of Astoria's motion based on statute of limitations grounds. (A.16-A.18). The statute of limitations issue was not raised in the Court of Appeals and is not before this Court.

reviewed should have no preclusive effect in federal court" (A.6; 901 F.2d at 1150), it remanded the case for further proceedings. (A.13).[6]

This Court granted Astoria Federal's petition for a writ of certiorari on January 7, 1991.[7]

STATEMENT OF THE ARGUMENT

This Court should vacate the Second Circuit's order and reinstate the District Court's dismissal of Plaintiff's ADEA lawsuit. It is precluded by the DHR's dismissal of Solimino's administrative complaint, after a hearing that satisfied the constitutional requirements of due process. The DHR acted in a judicial capacity in providing the parties an adequate opportunity to litigate their issues. Those issues of fact are the same issues as those that Solimino seeks to relitigate in his ADEA lawsuit. Since the New York Courts would give the DHR's fact-finding determination preclusive effect, so should the federal courts. (A.28-A.29).

The doctrine of administrative preclusion is applicable here. Nothing in the language or legislative history of the ADEA evinces an unequivocal Congressional intent to the contrary. The ADEA's procedural scheme for the filing and processing of administrative charges of age discrimination does not conflict with administrative preclusion. A claimant can proceed to court, after complying with Sections 14(a) and 14(b) of the ADEA by restricting his state agency involvement to exploring the possibility of an informal settlement of the dispute. Only the rendition of a finding on the merits by the state agency precludes a federal action, and then only if due process hearing requirements are satisfied; the earlier filing of a federal court ADEA action would stay the state agency proceedings.

[6] Because of its decision that administrative preclusion should not be applied, the Second Circuit did not reach the issue whether the state administrative proceedings in this case satisfied due process and should bind the District Court under principles of administrative estoppel.

[7] The mandate of the Court of Appeals has been stayed pending disposition of this proceeding.

Congress was aware that state agencies had enacted age discrimination statutes when it passed the ADEA. It cited to them approvingly, especially the New York Human Rights Law. If it intended to bar administrative preclusion from a state agency finding, Congress had the ability to do so. It did not elect that option.

Title VII's precedent is inapplicable here. Unlike the ADEA, Congress amended Title VII in 1972, to provide that the EEOC should give "substantial weight" to the findings made in prior state agency proceedings. Since the ADEA lacks such a provision and differs in its procedures from Title VII in several other respects, it should be interpreted to permit administrative preclusion. *See University of Tennessee v. Elliott*, 478 U.S. 788, 795 (1986) (nothing in the language or legislative history of 42 U.S.C. § 1983 "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion.").

ARGUMENT

POINT I

THE COURT OF APPEALS WRONGLY CONCLUDED THAT RESPONDENT'S FEDERAL COURT SUIT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT COULD NOT BE BARRED BY THE EARLIER "NO CAUSE" DETERMINATION OF THE STATE DIVISION OF HUMAN RIGHTS, DESPITE THE ABSENCE OF A CLEAR EXPRESSION OF CONGRESSIONAL INTENT IN THE ADEA TO DENY PRECLUSIVE EFFECT TO SUCH AN ADMINISTRATIVE DETERMINATION.

The District Court correctly held that the DHR's dismissal of Solimino's age discrimination complaint for lack of evidence was binding on a federal court in a subsequent ADEA suit, even though the state agency determination was not reviewed by a court. The District Court's decision rested upon a correct interpretation of this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). It should be approved by this Court.

A. The Doctrine of Common Law Administrative Preclusion Is Well-Established In The Federal Courts.

A long-recognized principle in federal jurisprudence grants preclusive effect to the judgments and records developed during administrative proceedings, including state administrative proceedings. As this Court recognized in *University of Tennessee v. Elliott*:

> [W]e have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Gunter v. Atlantic Coast Line R.Co.*, 200 U.S. 273, 289-291 (1906). Although § 1738 is a governing statute with regard to the judgments and records of state courts, because § 1738 antedates the development of

> administrative agencies, it clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect.

478 U.S. at 794-95.

Preclusive effect is crucial in avoiding duplicative proceedings, inconsistent results and dilatory relitigation of previously decided issues. As this Court held in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), in considering whether preclusive effect should be granted to a finding of the Advisory Board of Contract Appeals, which was adverse to a claimant:

> This is no more than our decision in *Carlo Bianchi* [*United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963)] requires. We held there that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were to be reviewed by that court on the administrative record. *These same reasons support the finality, in a suit for delay damages, of all valid and appropriate administrative findings already made in the course of resolving a dispute "arising under" the contract.*

384 U.S. at 420 (emphasis added).

The Court then reiterated the long-standing rule that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; *Hanover Bank v. United States*, 285 F.2d 455, 152 Ct. Cl. 391; *Fairmont Aluminum Co. v. Commissioner of Internal Revenue*, 4 Cir., 222 F.2d 622; *Seatrain Lines, Inc. v. Pennsylvania R. Co.*, 3 Cir., 207 F.2d 255 (footnotes omitted).

384 U.S. at 422.

This Court should not abandon the long-established and routinely applied principle of administrative preclusion without unequivocal direction from Congress to do so. As the Eighth Circuit found in *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988):

> "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l. Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, "[s]tatutes which invade the common law *** are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952). In *Allen v. McCurry*, 449 U.S. 90, 97, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980), the Court noted that as early as 1871 "res judicata and collateral estoppel could certainly have applied in federal suits following state-court litigation between the same parties or their privies ****" Although *Allen* involved preclusion under 28 U.S.C. § 1738, the Court in *Elliott* stated that the result would have been the same had common-law principles been involved.

843 F.2d at 280-81 (footnote omitted).

As we discuss next, *Elliott* illustrates the Court's recent application of the doctrine of administrative preclusion in the employment context.

B. This Court's Decision In Elliott Demonstrates The Need For A Clear Showing Of Congressional Intent To Overcome The Application Of Administrative Preclusion.

In *University of Tennessee v. Elliott*, the plaintiff filed an administrative charge under state law contesting his proposed discharge. Prior to the beginning of the state administrative

hearing, plaintiff filed suit in federal district court under Title VII and 42 U.S.C. § 1983, alleging that his proposed discharge was racially motivated. The district court permitted the state agency proceedings to go forward. Following the state administrative hearing, it was determined that the proposed discharge was not racially motivated. Elliott did not seek review of this decision in state court, but instead returned to federal court.

This Court stated that whether a judicially unreviewed state administrative determination is to be given preclusive effect depends upon Congressional intent. 478 U.S. at 796. To ascertain Congress' intent, the Court analyzed the language and legislative history of Title VII. Citing the language of 42 U.S.C. §2000e-5(b), requiring the EEOC to give "substantial weight" to prior state proceedings, the Court observed that it was inconsistent to accord state agency findings only "substantial weight," yet give them preclusive effect in a federal court suit.[8] Thus, with respect to the Title VII claim, the Court concluded that Congress did not intend unreviewed state administrative agency findings to be binding upon a federal court in a Title VII suit.

With respect to Elliott's § 1983 claim, however, the Court reached the opposite conclusion. The Court stated:

> "[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. . . .
>
> "Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion."

[8] The Court also referred to its discussion in *Chandler v. Roudebush*, 425 U.S. 840 (1976), of the 1972 amendments to Title VII, where the "plain meaning of the statute," *id.* at 848, written against a "backdrop of focused debate", *id.* at 852, with committee bills and reports revealing a "thorough and meticulous consideration of the question. . . and an unambiguous choice", *id.* at 853-854, caused the Court to hold that Title VII, as amended, granted federal employees the same right to de novo trials in federal court that was enjoyed by private sector employers. 478 U.S. at 795. No such language or legislative history is found with respect to the ADEA.

478 U.S. at 797, *quoting Allen v. McCurry*, 449 U.S. 90, 97-98 (1980).

Thus, *Elliott* requires the application of common-law rules of preclusion to unreviewed state administrative agency determinations, absent an explicit showing of Congressional intent to the contrary. As we show below, since the ADEA lacks a "substantial weight" provision, and otherwise differs from Title VII, the Court here should reach the same result as it did in *Elliott* with respect to § 1983.

C. The District Court Here Correctly Applied The Principles Enunciated In Elliott To Invoke Preclusion.

Here, applying the reasoning of *Elliott*, the District Court stated:

> *Elliott* teaches that administrative estoppel is presumed to be appropriate in any federal cause of action, absent a showing of Congressional intent to 'contravene the common-law rules of preclusion[.]' *Id.*, 478 U.S. at 797, 106 S.Ct. at 3226. Conversely, administrative estoppel is only inappropriate where the language or legislative history of the federal statute actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect.

(A. 21). As the District Court noted, implicit in *Elliott* is the presumption that existing common-law principles survive a Congressional enactment of a statute except when a contrary Congressional purpose is evident. (A. 21).

The District Court's analysis relied upon the Eighth Circuit's decision in *Stillians, supra*. There, the Court of Appeals held that a state administrative determination, which was not reviewed by a court, precluded a subsequent federal suit under the ADEA. The Court of Appeals stated that, under the Supreme Court's decision in *Elliott*, "when a federal statute does not specifically address a particular issue, in order to decide that issue we must ascertain Congressional intent." 843 F.2d at 280.

The Court in *Stillians* began its discussion with a recognition of the common-law doctrine:

> Thus, when the ADEA was enacted in 1967 preclusion was firmly established in the federal common-law. *Therefore, we begin our analysis of the ADEA with a presumption favoring preclusion. Absent an affirmative showing of Congressional intent to derogate from the common law ADEA claims may be precluded by prior unreviewed state administrative determinations.*

843 F.2d at 281 (emphasis added).

Analyzing the language of the ADEA, the Eighth Circuit observed that the ADEA has no provision similar to the "substantial weight" clause of Title VII[9] , which it said was "one of the major factors" for this Court's refusal in *Elliott* to give preclusive effect to state administrative agency determinations under Title VII. *Id.* The *Stillians* court concluded that while Title VII and the ADEA may be similar in certain other respects, those similarities were not controlling:

> When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar.

843 F.2d at 281-82.

With regard to the absence of unequivocal statements evidencing Congress' intent to abandon the long-standing principles of administrative preclusion of a subsequent lawsuit upon the same issue, the Eighth Circuit in *Stillians* went on to state that:

> In any event, our research has left us with the firm conviction that Congress did not intend to abrogate the common law when it enacted the ADEA. Whether this was by conscious design or by default is really not

[9] 42 U.S.C. §2000e-5(b).

> important. *Prior to the adoption of the ADEA, preclusion was alive and well in the federal common law, and absent a clear showing of Congressional intent to the contrary it should continue on.* Such a showing has not been made in this case.

843 F.2d at 282 (emphasis added).

Since the ADEA lacks a "substantial weight" provision and nothing in the legislative history or the language of the ADEA itself evinced an intent to contravene the common-law rules of preclusion, the Eighth Circuit correctly reasoned that an unreviewed administrative finding was entitled to preclusive effect. 843 F.2d at 282.

Other appellate courts have also stated that the ADEA could be amenable to administrative preclusion as a result of state agency determinations in appropriate cases. In considering whether a finding of a state unemployment insurance appeals board was entitled to collateral estoppel effect under the doctrine of administrative preclusion, the Ninth Circuit, in *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1283 (9th Cir. 1986), applied the *Elliott* analysis, stating that a "state administrative determination of a disputed issue of fact is entitled to preclusive effect provided that the state administrative agency acted in a judicial capacity" and provided that the parties had an adequate opportunity to litigate. Discussing the argument that the Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), requires state court review before an agency determination can have a preclusive effect under the ADEA, the Ninth Circuit said:

> We rejected this contention in *Plaine v. McCabe*, 790 F.2d 742, 748 (9th Cir.1986). Plaine relies on *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), and holds that a state administrative determination of a disputed issue of fact is entitled to preclusive effect provided that the state administrative agency acted in a judicial capacity and [the parties] had an adequate opportunity to litigate.

Mack, 798 F.2d at 1283.[10]

In *Delgado v. Lockheed-Georgia Co., A Div. of Lockheed*, 815 F.2d 641, *reh'g denied*, 820 F.2d 1231 (11th Cir. 1987), the Eleventh Circuit also considered whether a judicially unreviewed decision of a state administrative agency, which found that the plaintiffs were discharged for violating their employer's rules of conduct, barred relitigation of this issue under the "doctrine of administrative res judicata." 815 F.2d at 646. Rejecting the argument of the EEOC, which participated as *amicus curiae*, that *Elliott* conclusively established that state administrative agencies never could have a preclusive effect in a subsequent federal court lawsuit under the ADEA, the Eleventh Circuit found that:

> Nevertheless, the Court has frequently fashioned federal common law rules of preclusion where § 1738 does not apply. In the context of administrative fact-finding, the Court has upheld issue preclusion in subsequent lawsuits where the administrative agency acted in a judicial capacity in resolving disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. *Id.* at ____, 106 S.Ct. at 3226, 92 L.Ed.2d at 645-46, quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966).

815 F.2d at 646.[11]

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[10] Administrative preclusion ultimately was denied in *Mack* because the nature of the administrative proceedings did not warrant estoppel (i.e., the parties lacked an incentive to litigate the age discrimination claim before the Unemployment Insurance Appeals Board and engaged in informal administrative proceedings without a record to disclose whether evidence regarding age discrimination was introduced), rather than because the ADEA precluded its applicability. 798 F.2d at 1283-84.

[11] Like the Ninth Circuit in *Mack*, the Eleventh Circuit in *Delgado* did not finally determine "whether the findings of a state administrative agency should be denied preclusive effect in all cases [under the ADEA] because the findings at issue here [were] not the result of proceedings before a state agency charged with the enforcement of state age discrimination laws." *Delgado*, 815 F.2d at 646-47.

(Footnote continued)

The mere silence of Congress is insufficient to permit an unsuccessful claimant to escape the final administrative determination of his age discrimination claim. Consequently, the traditional doctrine of administrative preclusion should apply to bar a suit under the ADEA by a litigant who vigorously pursued *formal* administrative remedies before the state agency and who insisted upon and participated in adversarial litigation. The state agency evidentiary hearing demanded by and granted to Mr. Solimino far exceeded the brief, informal settlement efforts which would justify the ADEA's provisions for free and early recourse to the federal court. Solimino elected a state remedy and should be subject to the salutary repose of administrative preclusion.

D. Inappropriate Comparisons With Title VII Shed No Light On Congressional Intent Respecting The ADEA.

Both the district court below and the *Stillians* court rejected an analysis based on a comparison of the ADEA with Title VII. As stated in *Stillians*:

> We should not reason by analogy when interpreting statutes. The proper analysis is to examine the ADEA on its own for expressions of Congressional intent rather than merely compare and contrast it with Title VII.

843 F.2d at 281 (footnote omitted).

The Second Circuit here (in its "Fourth" point, A.8-A.10; 901 F.2d at 1151-52) and the Seventh Circuit in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987), erroneously sought to interpret the ADEA in parallel with Title VII. It is not appropriate to do so in light of their different origins and widely divergent procedural schemes. Even if it were appropriate, such a comparison fails to recognize the distinct origins of the two laws. The ADEA's enforcement provisions are derived from the Fair Labor Standards Act ("FLSA"), rather than Title VII. Thus, a comparative analysis of Title VII and the

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In a pre-*Elliott* decision, the Fourth Circuit concluded that administrative preclusion should not apply in a suit brought under the ADEA against a department of the federal government. *Rosenfeld v. Department of the Army*, 769 F.2d 237 (4th Cir. 1985), *criticized*, *Stillians v. State of Iowa*, 843 F.2d at 281 n.4.

ADEA sheds no light on Congressional intent to contravene the common-law rules of preclusion with regard to the ADEA.[12]

Congress in Title VII gave to the EEOC the authority to *investigate* and to *make findings* as to whether there is reasonable cause to believe that a charge of discrimination under Title VII is true. 42 U.S.C. § 2000e-5(b). In contrast, under the ADEA, the Secretary of Labor (and later the EEOC) was not authorized to make administrative findings. Instead, the Secretary was directed simply to seek to effect voluntary compliance through informal methods of conciliation, conference and persuasion. 29 U.S.C. § 626(b). Thus, as envisioned by the ADEA's drafters, he was to act as a mediator. S.Rep.No. 723, 90th Cong., 1st Sess. 5 (1967); H.Rep.No. 805 90th Cong., 1st Sess. 5 (1967); 113 Cong. Rec. 31,248 (1967).

If the Secretary's informal efforts to effect a settlement failed, the complainant had a judicial remedy available to him (unless the Secretary filed suit under § 7(c)(1)).[13] Thus, the early and unrestricted availability of a federal judicial remedy under the ADEA was premised on a brief, unsuccessful effort by federal officials to mediate a settlement, without formalities or findings of cause.

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[12] Senator Javits, speaking in support of S. 830, 90th Cong., 1st Sess. [a draft bill of the ADEA] stated:

> The enforcement techniques provided by S. 830 are directly analogous to those available under the Fair Labor Standards Act; in fact, S. 830 incorporates by reference, to the greatest extent possible, the provisions of the Fair Labor Standards Act.

113 Cong. Rec. 31,254 (1967).

Later, in response to a question whether a conflict would develop in the administration of the statute with Title VII, Senator Javits responded:

> I do not think this presents any particular problem. The Civil Rights Act of 1964 does not cover age discrimination, and S. 830 does not cover racial or religious discrimination. *The laws will operate completely independently of each other, as will the enforcement procedures.*

Id. at 31,255. (emphasis added). See, generally, *Lorillard v. Pons*, 434 U.S. 575, 585 (1978).

[13] 29 U.S.C. § 626(c)(1)

The comparative analysis of Title VII with the ADEA relied on by the Second Circuit and the *Duggan* court is unwarranted. So, too, is the Second Circuit's conclusion that administrative preclusion should be denied because less time was provided for administrative proceedings under the ADEA than under Title VII. (A.10-A.12; 901 F.2d at 1152-53).

E. The Second Circuit's Reasoning Is Incorrect.

The Second Circuit relied upon three provisions of the ADEA – § 14(a), § 14(b) and § 7(d)[14] – to support its finding that Congress did not intend the common-law rules of preclusion to apply. Its reliance is misplaced.

1. ***Contrary to the Second Circuit's conclusion, § 14(a) was enacted to protect employers by reducing litigation, not to protect grievants by facilitating it.***

Contrary to the Second Circuit's finding (A.7-A.8; 901 F.2d at 1151), the legislative history of § 14(a) clearly shows that Congress was not concerned with the issue of preclusion. Instead, its concern was with protecting employers from a multiplicity of suits:

> Furthermore, commencement of an action under this act shall be a stay on any State action previously commenced. *This provision will protect employers, such as those engaged in the transportation industry, from having to defend against a multiplicity of suits in various State courts when they operate simultaneously in several States.*

S. Rep. No. 723, 90th Congress, 1st Sess. 6 (1967), *reprinted in* Legislative History of the Age Discrimination in Employment Act, at 106, United States Equal Opportunity Commission (1981)(emphasis added); *accord*, 113 Cong. Rec. 31,251 (Yarborough)(Conf. Committee Report).

The Second Circuit did not cite any portion of the ADEA's legislative history to support this conclusion.

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[14] These sections of the ADEA were discussed by the Second Circuit in its "First," "Second" and "Sixth" points in its reversal of the District Court's dismissal of the Complaint.

Instead, the Court of Appeals cited *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), for the proposition that referral to the administrative agency was intended to provide an opportunity for voluntary conciliation satisfactory to the grievant. 441 U.S. at 756. This citation and the Second Circuit's analysis wholly ignores the operation of § 14(a), which applies only to those cases where a charging party has filed a federal lawsuit while the state proceedings are still pending. It is the filing of "an action under this chapter" that "supersedes any state action." 29 U.S.C. § 633(a). Thus, § 14(a) has no relevance to cases, such as this one, in which the state administrative agency has *completed* its processing of the age discrimination charge and dismissed a meritless complaint before any court proceeding is initiated.

Had he wished to exercise his right to bring suit under the ADEA, Mr. Solimino should have opted out of the state proceedings earlier and filed suit in federal district court; as long as he did so prior to issuance of an adverse state administrative finding, this filing would have stayed the state proceeding. 29 U.S.C. § 633(a). Instead, Solimino elected to vigorously litigate his claims before the state agency and did so through an administrative appeal. By the time he filed his federal suit, there was no longer any "state action" to supersede. He cannot now invoke § 14(a), therefore, to escape the consequence of his choice of remedial schemes.

2. *Contrary to the Second Circuit's conclusion, the sixty-day referral provision of § 14(b) does not evince a Congressional intent to override administrative preclusion.*[15]

Section 14(b) imposes a minimal limitation upon a grievant's ability to commence a civil action under the ADEA. He need wait only sixty days, scarcely enough time to permit the EEOC or the state agency to explore voluntary conciliation of the administrative charge. Furthermore, this period can be shortened if the state authority to which the charge was referred terminates its proceedings sooner. 29 U.S.C. § 633(b). "Terminate" may include an administrative decision, for whatever reason, to halt

[15] A.6-A.7; 901 F.2d at 1150-51 ("First" point).

conciliation efforts. It also may result from the claimant's refusal to participate in any state agency adjudicatory proceeding. *See E.E.O.C. v. Commercial Office Products, Inc.*, 486 U.S. 107, 115 (1988). If the state process were abandoned for any reason, then a federal court action under the ADEA could proceed. *See Oscar Mayer & Co. v. Evans*, 441 U.S. at 761 ("Section 14(b) does not stipulate an exhaustion requirement. The section is intended only to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief.").[16]

From the legislative history of the ADEA, it is evident that the purpose of the §14(b) referral provision was simply to allow a state administrative agency a brief period of time, not to exceed sixty days, in order to explore voluntary conciliation. Representative Perkins' Report to accompany H.R. 13054 clarifies the purpose of the initial sixty day "waiting period" and states:

> As was stated, aggrieved persons may similarly bring actions but a condition precedent to the bringing of action by an individual, is notice to the Secretary and the elapse of a period of 60 days. *This is to allow the Secretary to mediate the grievance.*

H.R. Rep. No. 805, 90th Cong., 1st Sess. 5 (1967)(emphasis added).[17]

[16] This case does not present the same issue as *Oscar Mayer* because there no factual adjudication by the state referral agency ever took place upon the allegations set forth in Mr. Evans' charge of age discrimination. This Court held that it would be inappropriate to bar an ADEA claim because a proceeding was time-barred under a shorter state statute of limitations. 441 U.S. at 762. In contrast, where, as here, the state agency makes final factual findings upon the substantive allegations of age discrimination, collateral estoppel should bar relitigation of those same issues in an ADEA action.

[17] The state authorities could perform this function under the referral provision. However, the ADEA also provides that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions" in the enforcement of state age discrimination laws. 29 U.S.C. § 633(a).

Referral for mediation, as was envisioned by the drafters of § 14(b), is consistent with the principle of preclusion. If a claimant chooses to participate in adjudicatory administrative proceedings that afford him due process, he should be bound by that final administrative result. As the Eighth Circuit stated in *Stillians*:

> Keeping in mind the presumption in favor of retaining long-standing common law principles, we find it highly probative that nothing in the ADEA is inconsistent with administrative preclusion. In fact, preclusion is consistent with the ADEA. For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, *it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738, or filing suit anew in the federal district court.* Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation. *Cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478, 102 S. Ct. 1883, 1895, 72 L.Ed. 2d 262 (1982) (giving finality to state court judgments increases parties' incentive to pursue review in state courts).

843 F.2d at 282. (emphasis added)

3. *Contrary to the Second Circuit's conclusion, Congress did not disapprove of existing state age discrimination laws in passing the ADEA.*

The Second Circuit incorrectly concluded that Congress "intended the federal courts to give no preclusive effect to the judicially unreviewed fact-finding of a state administrative agency" by ignoring the favorable citations in the legislative history to

New York's Human Rights Law and the growing body of state age discrimination laws and concluding that the ADEA was enacted to remedy what it perceived to be a patchwork of inadequate state laws. (A.8; 901 F.2d at 1151, "Third" point). There is nothing in the legislative history to support such a conclusion.

From the legislative history of the ADEA, it is plain that Congress looked with approval on state legislation prohibiting age discrimination during its consideration of the Act. For example, in his Report to accompany H.R. 13054, Rep. Perkins, noted that at the time: (1) "24 States [ ] have age discrimination legislation" of the type proposed in the ADEA. In the Report, Rep. Perkins went on to state that "[t]he overall reaction to the [state] laws is favorable," citing a survey conducted by the Manpower Administration of the Department of Labor in May-June, 1963. H.R.Rep.No. 805, 90th Cong., 1st Sess. 2 (1967); S.Rep.No. 723, 90th Cong., 1st Sess. 2 (1962). *Accord*, *Kremer*, 456 U.S. at 473 ("Indeed, New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination.")(footnote omitted); *Age Discrimination in Employment: Hearings on S. 830 Before the Subcomm. on Labor & Public Welfare*, 90th Cong., 1st Sess. 24 (1967) (statement of Jacob Javits, Sen.) ("Under these measures, the States have had broad success in reducing age discrimination and expanding job opportunities for older workers."); 113 Cong. Rec. 31248, 31250 (Yarborough, presenting Committee report No. 723)(Nov. 6, 1967).

4. *An ADEA complainant can preserve his right to sue in Federal Court, despite federal or state administrative proceedings.*

The Second Circuit, without citing supporting authority, incorrectly found that since a grievant lacked "control over the EEOC's decision to refer the case to the state agency," he should not be precluded by that agency's finding from proceeding with an ADEA lawsuit in federal court. (A.10; 901 F.2d at 1152, "Fifth" point). This conclusion ignores the ability of an ADEA claimant to insist that the EEOC or the state authority proceeding

be limited to exploring of the possibility of conciliation or settlement. *See Oscar Mayer & Co. v. Evans*, 441 U.S. at 761. Administrative preclusion is fully appropriate, therefore, when the claimant chooses to participate fully in an adjudicatory proceeding that results in a finding that is a final determination in the merits under state law. *Stillians v. State of Iowa*, 843 F.2d at 282 ("If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738, or filing suit anew in the federal district court.").

The Second Circuit also concluded (in its "Fourth" point) that because a decision neither of the EEOC nor of a state administrative agency would have preclusive effect under Title VII, de novo federal court review should not be precluded in an ADEA action. (A.8-10; 901 F.2d at 1151-52). The Court's conclusion is faulty. Once again, the Second Circuit's finding is based upon inapplicable interpretations of Title VII.

While the ADEA's substantive provisions may have been based, in part, on Title VII, judicial interpretations of Title VII do not dispose of the specific issue raised here. The question in this case is answered only by interpretation of the ADEA's own procedural scheme. As discussed above, at pp. 14-15, the ADEA has no "substantial weight" provision that is comparable to § 706(b), 42 U.S.C. § 2000e-5(b) of Title VII. Furthermore, provisions involving referral of an ADEA administrative charge to an appropriate state authority are procedural, rather than substantive, in nature.

Since the deferral procedure (and sequential processing of charges) of Title VII is substantially different than the referral procedure (and concurrent processing of charges) of the ADEA, no weight should be accorded Title VII precedent. For the same reason that the district court rejected the Seventh Circuit's reasoning in *Duggan*, that it "improperly conflates the issues of 'deferral' and 'preclusion'" (A.26), this Court should reject the Second Circuit's improper interpretation of the ADEA. Under Title VII, deferral to a state agency provides it only with

the "first crack" at the claim. Preclusion of a claim under the ADEA gives the state agency the "last word" on the claim "in a limited class of cases (i.e., those in which the state agency rules within 60 days, or rules after 60 days, but before the claimant files a federal action. *See* 29 U.S.C. § 633(a) and (b).)" (A.26).

Accordingly, the principle of non-preclusion developed in Title VII deferral cases cannot be transplanted to the ADEA.

5. *Application of administrative preclusion does not diminish the degree of protection available to a grievant under the ADEA.*

In the sixth justification for its determination, the Second Circuit catalogues what it sees as greater "grievant-protectiveness" under the ADEA than under Title VII. These protections, that Court contends, "indicat[e] a congressional intent to allow ADEA grievants earlier and freer access to federal court than Congress has allowed Title VII grievants." (A.10-A.11; 901 F.2d 1152). This, the circuit court says, indicates that Congress intended that prior agency fact-finding not judicially reviewed should not have preclusive effect. *Id.*

The Second Circuit is incorrect in its conclusion. Administrative preclusion does *not*, in fact, interfere with earlier and freer access to federal court. Its applicability to a proceeding merely directs a claimant to elect between an administrative or a judicial remedy. There is no interference with access to the courts if the grievant chooses to institute a civil action before the state agency has issued a final determination. No ADEA plaintiff who elects to seek a judicial remedy at the conclusion or termination of the statutory sixty-day review period is barred from suit in the federal court absent a state agency adjudication on the merits of the same issue after a fairly litigated proceeding. 29 U.S.C. § 633(b). If the claimant were to participate in an adjudicatory proceeding, then:

> In situations where the state is able to resolve a dispute within sixty days, the petitioner would be barred from federal court, but all of the purposes of the ADEA,

> including prompt resolution of discrimination claims, would be served.

Stillians, 843 F.2d at 282.

Here, Solimino had his choice, at any time after sixty days and before the rendering of a decision, to proceed with the state agency proceeding or to bring an action in federal court. He elected to entrust his matter to the DHR.

F. This Court's Decision in Kremer v. Chemical Construction Corp. Does Not Prevent Application Of Administrative Preclusion In Actions Under The ADEA.

In *Kremer*, the Supreme Court was called upon to answer a specific and narrowly focused question, which it answered in the affirmative:

> The principal question presented by this case is whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738. Specifically, we decide whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the State's own courts.

456 U.S. at 463. Thus, this Court was *not* called upon to determine whether preclusive effect should be given to an administrative agency's final determination and dismissal of a charge of *age* discrimination.

While the Court questioned the preclusive effect to be given to an unreviewed agency finding, it did not do so in the context of an ADEA proceeding. 456 U.S. at 469,n.7. Since the remedial schemes under Title VII and the ADEA are significantly different, the Court's comment in *Kremer* is inapplicable. *Stillians*, 843 F.2d at 281-82 ("When the only statutory language upon which the Court focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statute may be similar.").

POINT II

THE STATE DIVISION OF HUMAN RIGHTS' PROCEDURES IN THIS CASE SATISFIED THE DUE PROCESS CLAUSE, AND THUS ITS DETERMINATIONS ARE ENTITLED TO PRECLUSIVE EFFECT.

The District Court held that the DHR's procedures satisfy due process and, therefore, its determinations are entitled to preclusive effect. (A. 28-29). The Second Circuit, having decided that the ADEA was incompatible with administrative preclusion, did not reach the issue.

The District Court's holding is amply supported by the facts and applicable precedent. *Kirkland v. City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987); *see Rabinovici v. State of New York*, 108 Misc.2d 664, 665 (N.Y. Ct. Cl. 1981) ("Subdivision 7 of section 295 of the Executive Law provides that the Division may hold hearings, provide for cross-interrogatories, subpoena witnesses, compel their attendance, administer oaths, take testimony and require the production for examination of book or papers. . . .These are manifestly judicial or quasi-judicial functions. . . ."); *Allied Chemical, an Operating Unit of Allied Corp. v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271 (1988), *cert. denied*, 488 U.S. 1005 (1989) (giving preclusive effect to a decision of the State Public Service Commission, which was not reviewed by a Court.)[18] The DHR had statutory

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[18] Solimino cannot avoid the preclusive effects of the DHR's determination by declining to seek review in the state courts. As the Court of Appeals held in *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986):

> That the California Corporation Commissioner's decision here was not reviewed by a state court does not diminish its preclusive effect in federal court. Plaine could have sought state court review of the Commissioner's decision, Cal. Code Civ. Proc. § 1094.5 (West Supp. 1985), but chose not to do so. *If an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administrative decision simply by foregoing her right to appeal.*

797 F.2d at 719, n.12 (emphasis added). *Accord*, *DeCintio v. Westchester Co. Medical Center*, 821 F.2d 111-116 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987); *Eilrich v. Ramas*, 839 F.2d 630, 632 (9th Cir.), *cert. denied*, 488 U.S. 819 (1988) (Claimant's decision not to seek court review of an administrative proceeding does not bar application of the doctrine of administrative preclusion).

authority to adjudicate Solimino's complaint of age discrimination, and acted in a judicial or quasi-judicial capacity in determining that Solimino's complaint was groundless. (A.28-A.29, *citing Kremer*, 456 U.S. at 479-85 and *Kirkland* 828 F.2d at 107-09). Solimino had a full and fair opportunity to litigate his complaint at a hearing before the DHR. (A.28-A.29). The courts of the State of New York would give preclusive effect to the DHR's determination. *Hecht v. Monaghan*, 307 N.Y. 461 (1954). Thus, the requirements of due process have been met.

After dismissal of his age discrimination claim, Solimino appealed to the Human Rights Appeal Board. The Board affirmed the dismissal of his age discrimination complaint. Mr. Solimino then had the right, under New York law, to seek review in the Appellate Division of the State Supreme Court. He did not do so. Since Solimino had the right to appeal the state agency dismissal, he cannot escape preclusion of his subsequent ADEA claim. His decision not to seek review by the New York courts, after having been advised of its availability, should not shield him from the preclusive effect of the administrative ruling. *Plaine*, 797 F.2d at 719.

CONCLUSION

Since nothing in the ADEA prevents application of the doctrine of administrative preclusion and Solimino received an administrative hearing which satisfied the requisites for constitutional due process, the "no cause" determination of the DHR bars his suit under the ADEA. Thus, for the reasons set forth above, Petitioner prays for an order vacating the order of the United States Court of Appeals for the Second Circuit and reinstating the decision and order of the United States District Court for the Eastern District of New York dismissing this action.

Dated: February ____, 1991
Jericho, New York
New York, New York

Respectfully submitted,

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(7)

No. 89-1856

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In The

Supreme Court of the United States

October Term, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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No. 89-1895

In The

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October Term, 1990

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ANGELO J. SOLIMINO,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

INTRODUCTION

Based on this Court's guidelines in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), the issue at bar is whether Congress intended, in the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, *et seq.* ("ADEA"), that preclusive effect be given to judicially unreviewed fact-findings of a state

administrative agency. *Elliott*, 478 U.S. at 797; *Stillians v State of Iowa*, 843 F.2d 276 at 281 (8th Cir. 1988).

Respondent does not dispute that the doctrine of common law administrative preclusion is sufficiently established in the federal courts. Nor does Respondent dispute that the principles enunciated in this Court's decision in *Elliott* control by requiring a showing of Congressional intent to overcome the presumption of administrative preclusion. Respondent respectfully submits however, that the ADEA does reflect a clear Congressional intent to contravene that presumption.

SUMMARY OF ARGUMENT

While, in *Elliott*, this Court found, on the face of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* ("Title VII"), no explicit indication that Congress intended to reject agency preclusion, it nevertheless concluded that it would be incongruous for a federal court to give preclusive weight to unreviewed state agency fact-findings addressing the same claims. This Court reasoned that under Title VII, 42 U.S.C. §2000e-5(b), the EEOC is required to accord "substantial weight" to the state agency's findings of fact. Because a provision providing that the EEOC give "substantial weight" to unreviewed state agency fact-findings is necessarily inconsistent with a federal court according such fact-findings preclusive effect, this Court had no difficulty in concluding that Congress could not have intended for unreviewed state agency findings to have preclusive effect on subsequent federal actions brought under Title VII.

The mere absence of a "substantial weight" provision in the ADEA, an anti-discrimination statute modelled after Title VII, does not, however, support the inference that Congress intended agency preclusion to apply to actions brought under the ADEA. As

discussed *infra*, there is nothing comparable to this Title VII provision in the ADEA since, under the ADEA, the EEOC has no fact-finding powers of its own which parallel those given to state agencies under state anti-discrimination laws. Hence, the question of what weight, if any, the EEOC should give - in an adjudication - to the unreviewed fact-findings of a state agency in an ADEA case simply never arises.

Although no explicit language regarding the extent of EEOC deference to unreviewed state agency findings is found in the ADEA, there are other clear indications in the ADEA that Congress intended to reject state agency preclusion. These indications can be gleaned from the approach followed by the Seventh Circuit in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987), and by the Second Circuit in the case at bar, 901 F.2d 1148 (2nd Cir. 1990), i.e., comparing, in side-by-side fashion, the applicable agency deferral provisions in Title VII with those in the ADEA. This approach is consistent with the type of analysis adopted by this Court in *Elliott*. A side-by-side comparison of the two anti-discrimination statutes will demonstrate, in a logical and common sense manner, Congressional intent.

The provisions in the ADEA relating to federal-state relations evince a Congressional inclination to promote federal judicial action and, hence, to downplay the importance of state agency activities. Section 14(a) of the ADEA provides for instant judicial supersedure of all state actions upon commencement of a federal suit. In the case of a rapid termination of the state agency's processing, including the issuing of fact-findings adverse to a grievant, Section 14(b) provides for accelerated access to federal court, not agency preclusion. Similar language regarding accelerated state agency processing is found in Section 7(d)(2). In view of the legislative history leading to the addition of the "substantial weight" provision in Title VII, the

absence of such provision in the ADEA suggests that little or *no* weight, rather than substantial weight, should be accorded state agency findings.

Common sense also favors agency non-preclusion in the ADEA. A contrary result would give the state agency's processing a greater judicial impact than that of the EEOC, even though the federal agency may be presumed to have greater expertise in the area. Furthermore, a state agency filing is a jurisdictional prerequisite to federal court suit. Since there is no way to avoid the filing, agency preclusion resulting therefrom would be unfair. Moreover, there are no procedures in the ADEA for a grievant to opt-out of agency processing or determine its course.

Public policy also disfavors putting the state agency in the polar position of being either the main litigation arena or a minefield to be avoided. Either extreme undermines the efficacy of the state agency as a device for resolving claims to the satisfaction of the grievant.

An examination of the text of the ADEA, together with that of Title VII, legislative history, public policy considerations and principles of common sense, provides a more sensible approach than that followed by the Eighth Circuit in *Stillians*. There, the Court declined to make any side-by-side comparison between ADEA and Title VII, but instead started out with the presumption of a federal common law favoring agency preclusion and thereafter sought a facially expressed Congressional intent in the ADEA to rebut that presumption. As we show *infra*, the *Stillians* approach is mechanistic and ignores the broader purpose of the ADEA. To suggest that administrative preclusion must apply to the ADEA, unless the statute itself facially provides for some lesser weight to be attached to state agency findings, frames the inquiry in a way that effectively predetermines its outcome. *Elliott* holds that agency

preclusion will apply unless a contrary Congressional *intent* can be found; *Elliott* does not say that the ADEA must facially address, and then explicitly reject, agency preclusion.

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Petitioner has liberally peppered its Brief with assertions that Respondent has had his day in court by receiving a full-dress hearing before the New York State Division of Human Rights ("DHR"): Petitioner states that Respondent received "a hearing that satisfied the constitutional requirements of due process" (Pet.B. at 7)[1]; that he "vigorously pursued *formal* administrative remedies... [and]... insisted upon and participated in adversarial litigation." (Pet.B. at 17); that the DHR hearing "demanded by and granted to Mr. Solimino far exceeded the brief, informal settlement efforts..." (Pet.B. at 17); that Respondent "elected to vigorously litigate his claims" (Pet.B. at 20); that "he elected to entrust his matter to the DHR" (Pet.B. at 26); and that the DHR "acted in a judicial or quasi-judicial capacity in determining that Solimino's complaint was groundless" (Pet.B. at 28). Petitioner even devotes Point II of its Brief to the claim that the DHR procedures at bar "satisfied the due process clause" (Pet.B. at 27).

Respondent respectfully objects to each of these various assertions because they have no place in this appeal. They are irrelevant to, as well as unsupported by, the record herein. Moreover, Respondent appealed precisely this issue to the Second Circuit. Only in a footnote does Petitioner correctly acknowledge that the Second Circuit did not reach the issue of whether the DHR proceedings below had satisfied due process so as to bind the District Court

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[1] References to Petitioner's Brief are cited as ("Pet.B. at ___").

(Pet.B. at 7, n. 6). The *sole* question addressed to the Second Circuit, and thus presented on this appeal, is whether or not that Court was correct in holding that state agency preclusion should not apply to unreviewed agency findings so as to bar a subsequent action under ADEA. *See* Rule 24.1(a) of the Rules of this Court. Accordingly, this Court should disregard and not consider any matters relative to the adequacy of the hearing or the sufficiency of the due process allegedly received by Respondent before the DHR. *Cf. Elliott*, 478 U.S. at 799, n. 8.

For the reasons summarized above and to be discussed herein, Respondent urges this Court to adopt the well-reasoned decisions of the unanimous panels of the Seventh Circuit in *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987), the Fourth Circuit in *Rosenfeld v. Dept. of the Army*, 769 F.2d 237 (4th Cir. 1985), the Second Circuit in the case at bar, 901 F.2d 1148 (2nd Cir. 1990), and the pointed dissent of the Eighth Circuit in *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988).

ARGUMENT

POINT I

THE APPLICABLE LEGISLATIVE HISTORY INDICATES AN INTENT BY CONGRESS TO FAVOR THE BRINGING OF A PRIVATE ADEA ACTION

While there do not appear to be any unequivocal assertions in the ADEA's legislature history as to Congressional intent on the question of state agency preclusion, there are nonetheless several strong indications to suggest that judicially unreviewed fact-findings at the state agency level were never intended to have preclusive effect.

First, Congress passed the ADEA in 1967, within three (3) years after the passage of Title VII in 1964, a closely analogous anti-discrimination statute upon which the ADEA was modelled in many respects. *See, Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); the case at bar, 901 F.2d 1148 (2nd Cir. 1990); and *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564 at 1568 (2nd Cir. 1989), which states:

> Our interpretations of the ADEA rely heavily on decisions arising under Title VII... "for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" (Citing *Thurston* and *Lorillard*.)

In *Elliott*, this Court found that Congress had indeed departed from the previous presumption of common law agency preclusion when it enacted Title VII. It is difficult to attribute an intent by Congress to make an about-face in the ADEA and revert back to common law agency preclusion. If Congress had intended in the ADEA to contravene the emerging trend of no agency preclusion, as reflected in Title VII, presumably it would have heralded such flip-flop intentions in a more befitting manner than complete silence.

Second, if any other emerging Congressional trend is indicated between the dates of passage of Title VII in 1964 and the ADEA in 1967, it is toward *decreased* reliance on state agency processing procedures. For instance, instead of the 180 or 300-day deferral period required for state and federal agency processing before commencing a private suit under Title VII, 42 U.S.C. §2000e-5(f)(1), the ADEA requires a mere 60-day deferral period. 29 U.S.C. §633(b). Unlike Title VII, 42 U.S.C. §2000e-5(c), the ADEA does not provide an *exclusive* 60-day period for state agency processing. Moreover, while Title VII requires that the EEOC defer its processing to the state agency for sixty (60) days, the ADEA does

not require *sequential* agency processing; it allows *concurrent* processing by the EEOC and by any state agency, thereby allowing the entire agency processing phase to be completed that much sooner. 29 U.S.C. 633(b). While Title VII requires that a grievant obtain a notice of right to sue letter from the EEOC before commencing suit, the ADEA imposes no such "visa" procurement requirement, as a jurisdictional prerequisite to suit, on a grievant seeking access to the federal courts. 42 U.S.C. §20003-5(f)(1).

The ADEA favors private actions more than does Title VII. Unlike Title VII, the ADEA allows grievants to recover double or liquidated damages. 29 U.S.C. §216(b) and §626(b). The availability of such a remedy in the ADEA strongly suggests that Congress wanted to provide *more* incentives than those available under Title VII in order to encourage the filing of private suits rather than the administrative processing of complaints. The statutory amendments to the ADEA in 1978, confirming the availability of a jury trial, 29 U.S.C. §626(c)(2) - a right which remains unclear for actions under Title VII - is yet another indication that Congress intended to give greater encouragement to the bringing of private suits under the ADEA.

Given this bounty of incentives for private suit, it is not likely that Congress contemplated state agency processing as an attractive or effective enforcement alternative to private action under the ADEA. To endow state agency fact-findings with preclusive effect in age discrimination matters would run precisely *counter* to several provisions clearly seeking to encourage judicial suits under the ADEA.

POINT II

REFERENCES IN THE ADEA INDICATE THAT LITTLE OR NO WEIGHT SHOULD BE ACCORDED TO STATE AGENCY FACT-FINDINGS

The various references in the ADEA to state agency proceedings do not reflect that *any* substantive weight, let alone preclusive effect, should be attached to such proceedings in any subsequent judicial proceeding brought under the ADEA.

A. SECTION 14(a):

Under Section 14(a) of the ADEA, 29 U.S.C. §633(a), any state action is instantly "superseded" once a private federal suit under ADEA is commenced.[2] This section provides:

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

At the very least, "supersede" means that all such agency proceedings are stayed, if not permanently dismissed.[3]

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2 Petitioner's suggestion (Pet.B. at 19), that this Section is designed only to limit *state court* law suits is belied by the words "state action" which include all proceedings, judicial and administrative, and by the word "agency" at the start of the Section.

3 "Supersede" means "Obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal." *Black's Law Dictionary* 1607 Rev. 4th Ed. 1970. (Citing *City of Los Angeles v. Gurdane*, 59 F.2d 161, 163 (9th Cir. 1932).)

If Congress had remotely intended state agency findings to be given substantial, let alone preclusive, weight by a federal court in an ADEA action, it presumably would have granted the EEOC and the applicable state agency more than a scant 60-day deferral period to perform their respective processing functions before instant supersedure would apply. Since under Section 14(a) an EEOC or state agency proceeding may be abandoned by a grievant, after a mere sixty (60) day deferral period, regardless of the stage of the agency investigation, it is difficult to believe that Congress intended to attach much importance to such agency endeavors. To the extent the ADEA contemplates instant supersedure, the importance of interim agency proceedings is diminished.

Petitioner has also suggested, (Pet.B. at 20), that Section 14(a) has no relevance to *completed* state agency proceedings—only to ongoing proceedings.[4] The fact that Section 14(a) cuts off *pending* state proceedings does not mean that it should have no impact upon *completed* proceedings. If Section 14(a) of the ADEA provides the triggering mechanism, i.e., a federal action under ADEA, for superseding a pending state agency proceeding, even before a fact-finding determination is reached, it defies logic to hold that the same state agency proceeding can, in circular fashion, supersede said federal action.

B. SECTION 14(b):

The language of Section 14(b) of the ADEA, 29 U.S.C. §633(b), further confirms the relative non-importance of state agency actions. This Section provides that if a state agency should terminate its

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[4] By this argument, Petitioner appears to concede that this Section does, in fact, apply to state agency proceedings, not merely to state court actions.

processing of a grievant's claim before the 60-day deferral period ends, there is no bar to federal action but, rather, a *pro tanto* acceleration of the deferral period, thereby allowing a federal ADEA suit to be commenced by a grievant that much sooner. This Section provides:

> ... no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

See Oscar Mayer & Co. v. Evans, 441 U.S. 750 at 759 (1979).

When a state agency terminates its processing prior to the expiration of sixty (60) days, it invariably does so because it has made fact-findings manifesting no basis for the employee's claim, not fact-findings which show that the employer violated the law. In allowing for a shortening of the deferral period upon a rapid termination of the state agency proceedings, Congress had in mind the situation where the employee, *not* the employer, does not prevail before the state agency.[5] Thus, the cases most likely to fall into the category of quick termination will be those of "no probable cause." *Id.* The fact that, even in such seemingly "open and shut" cases against a grievant, Congress contemplated that he or she might still

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[5] For example, under the New York State Human Rights Law ("HRL"), Sections 297.2 to 297.4, it is virtually impossible for an employer to receive *(continued)* a final adverse fact-finding decision within 60 days. At most, in that time frame, after a preliminary investigation, there can be a *non*-judicial finding of "probable cause" adverse to the employer. The employer then remains free to dispute that preliminary finding in a "public hearing" where factual issues are adjudicated by an administrative law judge. (See Point III[D], *infra*.)

be able to bring a federal suit under the ADEA, (and even sooner), rather than face agency preclusion, is compelling evidence that Congress could not have intended for such judicially unreviewed state agency fact-findings to have preclusive effect.

C. SECTION 7(d)(2):

A similar acceleration procedure to that in Section 14(b) appears in Section 7(d)(2), 29 U.S.C. §626(d)(2). This provision requires that a charge be filed ith the EEOC:

> "... within 300 days after the alleged unlawful practice occurred, or within 30 days after... notice of termination of proceedings under State law, whichever is earlier."

Here, again, if Congress had intended the fact-findings of the state agency to receive preclusive effect, there would have been no purpose in mandating any subsequent filing by the grievant with the EEOC. If a federal court would be bound by the adverse state agency fact-findings in any event, a filing with the EEOC would be superfluous since, *a fortiori*, that agency would similarly be bound.

In contrast to these textual instances suggesting no agency preclusion, there appears no language, procedural mechanism or other indicia anywhere in the ADEA or in its legislative history suggesting a Congressional intention to effect agency preclusion.

D. THE ABSENCE OF A "SUBSTANTIAL WEIGHT" PROVISION:

Petitioner notes that the ADEA lacks a "substantial weight" provision similar to that found in Title VII and argues that this ommission provides a basis for finding agency preclusion. (Pet.B. at 15.) Petitioner's argument, however, supports Respondent's

position. Under the ADEA, rather than have the EEOC bound by the state agency's findings, the legislative history strongly suggest that the EEOC is free to give *less* or even *no* weight at all to unreviewed state agency fact determinations.

In 1972, Congress added a "substantial weight" provision to Title VII in order to increase the EEOC's deference to state agency fact-findings. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 at 474-75 and n. 16 (1979). Prior to the 1972 amendments, the EEOC had been free in a Title VII case to ignore state agency findings and accord them no weight at all. *Id.* at 470-71, n. 8; *Duggan*, 818 F.2d at 1297. Since no similar "substantial weight" provision was added to the ADEA, the only logical conclusion is that the EEOC remains free, when processing a claim under ADEA, to continue to accord no weight at all to any state agency determinations. If the EEOC is free to give little or no weight to state fact-findings, a federal court should not logically be obliged to give such findings preclusive effect.

E. THE ABSENCE OF ANY WARNING:

There is no warning in the ADEA to grievants, despite the fact that state agency proceedings may be abruptly discontinued or stayed by the commencement of an ADEA suit, that any state agency findings issued before the federal suit is brought will nonetheless be given preclusive effect.[6] Considering the dire consequences of such a result in a statute that is plainly remedial in nature, the absence of a warning is incongruous.

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[6] Similarly, there is no indication in the record below that Respondent at bar received any notice or other suggestion from the DHR that any proceeding in which he participated would be given preclusive effect.

* * *

In sum, the policies of instant judicial supersedure of all state actions and accelerated access to federal court before state agency findings are made, although not logically exclusive of automatic agency preclusion after fact-findings are made, are nonetheless fairly incompatible with agency preclusion. The absence of any mention in the ADEA of this incompatibility suggests that Congress itself perceived no possibility of agency preclusion and, hence, saw no need to reconcile it with other ADEA provisions. Finally, since the purpose of the 1972 "substantial weight" amendment to Title VII was to increase the EEOC's deference to state agency findings (where previously there had been no deference at all), the failure of Congress to add a similar "substantial weight" amendment to the ADEA shows that Congress wanted *less* deference by the EEOC and, by logical extension, the federal courts, to apply to state agency findings in ADEA cases.

POINT III

STATE AGENCY NON-PRECLUSION IS WARRANTED UNDER PRINCIPLES OF FAIRNESS AND LOGIC

A. UNDER STATE AGENCY PRECLUSION, THE EEOC'S GREATER EXPERTISE WOULD BE IGNORED:

The ADEA mandates, in Sections 7(d) and 14(b), that, prior to institution of a private federal action, an employee file a charge of age discrimination with both the EEOC and the state agency and wait a minimum of 60 days thereafter before bringing suit. During that waiting period, the EEOC can, on a concurrent basis with the state agency, investigate the charges or institute an action based thereon, but it *cannot* adjudicate the claim and/or make fact-findings. State agencies, however, depending upon the state statute under which they are empowered to act, can both investigate

and issue fact-findings. See, for example, Sections 297.2 to 297.4 of the HRL.

When Congress enacted the ADEA in 1967, it was doubtless aware of the dual investigation/adjudication capacity of certain state agencies. Congress also knew that the Department of Labor, the federal agency then charged with responsibility for enforcing the ADEA, would soon, through experience, develop professional expertise in investigating and resolving age discrimination complaints. If Congress wanted state agency findings to have preclusive effect under ADEA, presumably it would have given comparable fact-finding powers to the federal agency, if not according preclusive effect to such findings. The omission suggests that unreviewed fact-findings of a state agency were not intended to have a greater impact on federal ADEA actions than those of the federal agency responsible

for enforcing the ADEA.[7] Yet, if the parallel state agency were to exercise both its investigatory and adjudicatory powers, and if its fact-findings were then given preclusive effect, EEOC processing would be rendered nugatory. *Duggan*, 818 F.2d at 1295; *Kremer*, 456 U.S. 461, 470, n. 7.

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7 This is not to say that state agency fact-findings serve no purpose in the ADEA. Such findings may be given weight, in a federal ADEA suit, on a discretionary basis, depending upon who conducted the investigation, the degree of procedural fairness, the extent and nature of the fact-finding procedures, the adequacy of the record, the reliability of the findings, the extent of the credibility issues, etc. *Cf., Whatley v. Skaggs Cos.*, 707 F.2d 1129 (10th Cir. 1983), *cert. den.*, 464 U.S. 938, with *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924 (7th Cir. 1984). *See* also *Alexander v. Gardner-Denver*, 415 U.S. 36 at 60, n.21 (1976).

B. THE STATE AGENCY FILING IS MANDATORY:

There is another logical reason why Congress could not have intended state agency preclusion. A grievant has *no* discretion to forego completely state remedies in favor of a federal lawsuit. Under *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 at 756 (1979), a grievant is required, by Section 14(b) of the ADEA, as a jurisdictional perquisite to federal suit, to make an initial filing with the applicable state agency. Since that pre-suit filing requirement cannot be bypassed, a grievant intent on bringing a suit under the ADEA would be obliged to have his private federal suit ready for filing on the 61st day to minimize the possibility of preclusion. On the other hand, a grievant may not be desirous of abandoning all state agency processing after only 60 days. The threat of agency preclusion would force the grievant to make up his mind about the desirability of private litigation at a premature stage in the proceedings. Because this would deprive the grievant of any meaningful opportunity to weigh the merits of his case at the state agency level, before plunging into a federal court suit, the assertion by Petitioner that the grievant should have to "live with his decision", (Pet.B at 22, citing *Stillians*, 843 F.2d at 282), is unwarranted.

The very shortness of the state agency deferral period does not ameliorate the problem. Although it is unlikely that a 60-day turn-around period provides adequate time in which a complete investigation and fact-findings could be made, a grievant still remains at some risk, in this period, of incurring an adverse agency fact-finding. Believing that his case is progressing to a conclusion, or not yet being able to incur legal expenses in a court suit, a grievant may wish to grant the state agency some additional time, beyond 60 days, to further investigate and possibly resolve the matter. (See Point III [C], *infra*, however, regarding a grievant's general inability to monitor the agency's actions.) Because of his exposure to

possible adverse fact-findings, the grievant is placed in a quandary whether to allow the state agency more time to resolve the matter, or else to proceed to federal court, thereby preempting further state processing. Where a grievant wants only to give the state agency a fair opportunity to pursue conciliation activities, for whatever reason, he should not be penalized because the state agency has proceeded beyond his expectations and issued fact-findings against him.

C. THE GRIEVANT CANNOT ANTICIPATE OR DETERMINE THE STATE AGENCY'S ACTIONS:

Petitioner notes that Section 7(d) provides for a brief 60-day period because it was expected that the EEOC would merely attempt to mediate the grievance in this period. (Pet.B. at 21.) But the 60-day deferral period equally applies to all state agency processing under Section 14(b). It is anomalous that Congress would have limited the EEOC to 60 days to conduct mediation activities, while at the same time believing that the state agency could reasonably accomplish more than mediation activities in this limited time period.

This suggests another reason to doubt that Congress intended the state agency's role to be significant in this 60-day period. If Congress had intended for the state agency to do more than conciliate, it presumably would have given grievants a means to opt-out of such agency processing if it was not proceeding as expected. Yet, the ADEA is silent about what procedures, if any, a grievant can take, once he has made the mandatory filing, if he does not want the state agency to investigate in depth or to make fact-findings prior to the expiration of the deferral period.[8]

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[8] Under *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), the only

The assertion by Petitioner, that an ADEA claimant has the "ability... to insist that the... state authority proceeding be limited to exploring of the possibility of conciliation or settlement:" (Pet.B. at 23-24), is unfathomable.[9] Surely, neither the HRL nor the Rules of Practice of the DHR provide a procedure for a grievant to instruct the DHR *not* to investigate or make fact-findings. Petitioner's alternate suggestion, that agency preclusion is "appropriate" when the claimant "chooses to participate fully" (Pet.B. at 24), begs the question. If the claimant elects to participate less than fully, in the hope of avoiding preclusion, even to the extent of not cooperating or of defaulting, he would only increase the chances of an earlier adverse fact-finding—not decrease the chances of agency preclusion.

Finally, even if a grievant could somehow request the state agency to conduct only limited processing, he would have no way to verify if his request was being honored. State agency investigations are not necessarily conducted in close consultation with the grievant. Given the state agency filing requirement imposed on a grievant by Section 7(d), unaccompanied by any corresponding method within the deferral period to opt-out, to participate less than fully, or to monitor the agency's course of action once the filing is made, it seems questionable whether Congress intended state agencies to pursue more than preliminary investigation and conciliation in the limited time allotted.

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way that a state agency fact-finding would be given preclusive effect would be if the parties sought judicial review in a state court. As discussed in Point IV(B)(1), *infra*, *Kremer* establishes a "bright line" for either avoiding the preclusive effect of a state agency finding or providing a means to evoke agency preclusion if desired.

9 Petitioner's citation to *Oscar Mayer*, 441 U.S. at 761, is inapposite.

D. CERTAIN STATE AGENCY PROCEDURES PROVIDE A DOUBLE ADJUDICATORY OPPORTUNITY FOR THE EMPLOYER:

As noted in Point II(B) (n. 5), the procedures of certain state agencies are designed to give the employer, in effect, two (2) bites of the apple. For example, under Section 297.2 of the HRL, a preliminary finding of "no probable cause" at the investigative or pre-hearing stage against the grievant, such as occurred at bar, terminates all further agency proceedings. On the other hand, a preliminary finding of "probable cause" against the employer does not terminate all further proceedings; it merely results in setting down the matter for further proceedings by the state agency, including the holding of a public hearing, at which formal fact-findings are made. *See* Section 297.4(a) of the HRL. Since no adjudication against the employer can ever occur until after the completion of the public hearing, only the employee is at risk in the early stages of an agency investigation of an adverse determination.

The asymmetry resulting from the fact that certain state agency proceedings can yield a result adverse to the employee in the agency deferral period, but not to the employer until after a public hearing, creates a situation where wide, and sometimes inequitable, variations in state agency processing will determine whether or not an ADEA action can be brought. Such a haphazard state of affairs raises a further doubt that Congress contemplated preclusive effect would be given to state agency proceedings.

E. THE STILLIANS APPROACH DOES NOT ADMIT OF LOGIC OR COMMON SENSE CONSIDERATIONS:

The Eight Circuit in *Stillians* adopted a mechanistic approach to Congressional intent. It determined that since there is a federal common law which presumes agency preclusion, that presumption

must stand under the ADEA unless clear contrary rebuttal language can be affirmatively discerned from the ADEA or its legislative history. 843 F.2d at 280-1. There are certain defects to this type of approach.

The *Stillians* approach stacks the deck before the issue at bar can be fairly addressed. If the sole question before this Court reduces to whether the ADEA, on its face or in its legislative history, states a clear rebuttal of the common law presumption of agency preclusion, that approach, involving little more than a glorified word hunt, leaves practically no room at all for this Court to consider the underlying merits of the issue on any other ground, including public policy, logic or common sense. In fact, to pose the question at bar *solely* in such terms narrows the inquiry in a way that prevents any meaningful analysis. Nothing in *Elliott* mandates posing the question in such restricted terms.

Moreover, the *Stillians* Court's fixation upon the common law presumption of agency preclusion ignores the fact that there are any number of other types of presumptions which if not rebutted could lead to contrary results: Since the ADEA is remedial legislation, there is a "presumption" that it should be liberally construed to favor the aggrieved employee. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765 (1979), (Blackmun, J., concurring opinion). There is a "presumption" that, because the ADEA is relatively similar to Title VII, Congress would have wanted the question of agency preclusion to be resolved in the same manner for both statutes. If a grievant has *de novo* rights under Title VII, even in the face of an adverse fact-finding by the state agency or EEOC, it may be "presumed" that Congress would have intended that the ADEA confer the same common law *de novo* rights in the case of an adverse state agency determination. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) at 469, n. 7. Because of the shortening of the deferral

period in Section 14(b), (discussed *supra* in Point II[B]), there is a "presumption" that Congress intended to speed up access to the federal court, not to impose further impediments thereto. Finally, given its inclination to encourage the conciliation efforts of state agencies, Congress "presumably" did not want to deter grievants from utilizing the state agency's machinery by the threat of agency preclusion.

In sum, there are any number of presumptions which could apply at bar with the same force, but to the opposite effect, as the presumption of common law agency preclusion. The decision by the *Stillians* court to single out this one presumption, to the exclusion of all others, is simply too wooden an approach to provide a meaningful basis for proper judicial analysis.

POINT IV

PUBLIC POLICY CONSIDERATIONS POINT TOWARD AGENCY NON-PRECLUSION

The public policy considerations implicated in this matter provide several reasons for disfavoring agency preclusion in ADEA actions:

A. THE NEED TO BE CONSISTENT WITH THE MORE GRIEVANT-PROTECTIVE NATURE OF THE ADEA:

Agency preclusion denies the grievant many of the several benefits of an ADEA action which are not available under state law: A grievant who proceeds before DHR will be denied a right to jury trial at both the DHR investigative and public hearing levels; a right to jury trial is guaranteed in a private action under Section 7(c)(2) of the ADEA. A grievant may be denied the benefits of favorable ADEA case law relative to the nature of the proofs required (i.e., permitting age discrimination to be inferred under the "indirect"

method of proof in the situation where there is no direct or circumstantial evidence of age discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). A grievant will be denied the right to recover liquidated damages and attorney's fees available under ADEA but not necessarily available under state law. A grievant may not receive the full measure of other legal and equitable remedies available under the ADEA (e.g., front pay, prejudgment interest and continuing court supervision) which may or may not be available under state law.

B. THE NEED FOR PRESERVING UNIFORMITY IN THE LAW IN THIS AREA:

Even if the ADEA were not abundant in its statutory remedies, this Court has an overriding obligation to foster an internally consistent and uniform body of case law under the ADEA. Giving preclusive effect to judicially unreviewed state agency findings is inconsistent with, and runs counter to, several well-established principles promulgated by this Court applicable to ADEA and Title VII litigation:

1) Under *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), a case arising under Title VII, this Court has held that judicially *reviewed* state agency findings are entitled to preclusive effect. This Court, in *Kremer*, also stated that "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such [*de novo* federal court] review, even if such a decision were to be afforded preclusive effect in a State's own courts." 456 U.S. at 470, n. 7. This language cannot be dismissed as mere *dictum* inapplicable to ADEA actions, as Petitioner would so argue (Pet.B. at 26). Moreover, a determination that *unreviewed* agency findings were entitled to the same

preclusive effect as *reviewed* findings would make the state court's review meaningless.

2) Under *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), a grievant is not permitted to bypass or ignore any applicable state agency filing requirement in order to bring suit under ADEA. This Court has made it clear, however, that no *additional burdens* on access to the federal remedy should be imposed. *Id.* at 762-3. Accordingly, this Court held that the state agency filing may be made untimely, and on a *pro forma* basis, without causing the grievant's federal claims to be dismissed. *Id.* Agency preclusion would turn *Oscar Mayer* on its head. It would deny access to federal court to any grievant who received an adverse state agency finding during the mandated period of deferral (clearly an additional burden).

Theoretically, an artful grievant may be free, depending on the time constraints imposed by Section 7(d) and by state law filing requirements, to circumvent state agency processing. *Id* at 763-4. For example, he could wait until after the state statute of limitations for filing had expired and then late-file his state charge before or even after his federal suit. Alternatively, a grievant who filed timely with the EEOC might be able to persuade that agency not to refer a copy of his charge over to the applicable state agency. Since such a grievant could, if so advised, effectively forego an available state remedy, while preserving his federal remedy, it would be unfair to penalize another grievant who, unwittingly or in good faith, has made a timely filing, only to find that the state agency has abruptly issued fact-findings against him. Moreover, recognizing that such tactics are not proper, but seeking nonetheless to discourage an employee from utilizing them, this Court has explained that no advantage could be gained: "Prior resort to the state remedy would not impair the availability of the federal [EEOC] remedy, for the two are supplementary, not mutually exclusive." *Id.* at 764. In light

of this Court's assurance that a grievant will not be put in jeopardy by making a state agency filing, agency preclusion cannot apply in the absence of judicial review.

3) Agency preclusion is wholly inconsistent with this Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), that findings of arbitrators in a Title VII context are not entitled to preclusive effect. The underlying rationale for this decision is that access to the federal remedy in such cases should not be limited by prior non-judicial adjudications. The same rationale for not giving preclusive effect to arbitration awards is equally applicable to not giving preclusive effect to state agency findings. The broad federal policy of allowing a grievant unfettered access to pursue a judicial remedy with respect to the federal anti-discrimination statutes should not be eroded by dubiously based exceptions. *Rosenfeld*, 769 F.2d at 239.

4) As previously stated, agency preclusion under ADEA is inconsistent with agency non-preclusion under Title VII, as mandated in *Elliott*. Many appellate courts have made it clear that, since the ADEA was substantially modelled after Title VII, these two statutes should be construed in the same fashion whenever possible. *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2nd Cir. 1989) ("for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Lorillard v. Pons*, 434 U.S. 575 at 584 (1978). A finding of agency preclusion would not only create non-uniformity in the anti-discrimination laws, it would so unsettle accepted precedents as to raise the spectre that other arcane distinctions might exist between ADEA and Title VII. Where there are no facial barriers, as at bar, to preserving uniformity in the application of the two statutes themselves, this Court should be reluctant to expand the instances of non-uniformity.

C. THE NEED TO UTILIZE THE STATE AGENCY'S RESOURCES AND PROCEDURES IN A PROPER FASHION:

There are still other policy reasons for not finding agency preclusion. Grievants who file with a state agency normally do so without the aid of counsel; often they are told that private counsel is not needed and they are assured that the state agency itself will fully protect their rights. If this Court finds state agency preclusion should apply, state agency processing will hereafter become a veritable trap for the unwary who do not know that their failure to take prompt steps to supersede the state agency action, i.e., by institution of a federal court suit, will forever bar their claims.

On the other hand, for those grievants who are sufficiently sophisticated or able to retain counsel, state agency processing will become dramatically altered if agency preclusion applies. Even at the investigative level, state agency processing will instantly become a much more complicated, costly and time-consuming drain on the state agency's resources than most state legislatures had contemplated. Considering the varying degrees of expertise and resources of most state agencies, it would seem preferable to retain this forum for early conciliation and mediation purposes, rather than to convert it into the main litigation arena.

Alternatively, counsel for certain employees may find that entrusting their clients' claims to the state agency's expertise is not worth the risk. Not wishing to face the possibility of an adverse determination, such counsel may seek to defer any substantive processing until a federal suit may be brought. Rather than devote any efforts before the state agency, some grievants will, in fact, be advised not to offer any cooperation for fear that this will constitute an invitation for the agency to proceed further and issue fact-findings which may be unfavorable to them. It is not unlikely that the same

grievants, fearful of an adverse determination, will also race to the federal courthouse on the 61st day following their state agency filing.

This proactive approach will effectively undermine even limited conciliation efforts attempted by the state agency. It would also frustrate one of the essential purposes of state agency deferral; i.e., to screen from the federal courts complaints that could be settled to the *satisfaction of the grievant* in less formal proceedings. *Oscar Mayer*, 441 U.S. 750 at 755-56. *See* also *Elliott*, 478 U.S. at 788 (Stevens, J., concurring in part and dissenting in part).

In sum, if state agency preclusion were to apply, the state agency would find itself in the unwelcome position of being either the main litigation battleground for some grievants, or else a minefield to be carefully eschewed by others. Both extremes defeat one of the essential purposes of state agency deferral, which is to resolve discrimination claims by conciliation and early settlement, to the satisfaction of the parties, before they become full-fledged federal court lawsuits.

CONCLUSION

For the reasons discussed herein, the Order of the U.S. Court of Appeals for the Second Circuit should be affirmed in all respects.

Dated: March 22, 1991
New York, New York

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No. 89-1895

In the Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

ANGELO J. SOLIMINO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether, in a federal court action under the Age Discrimination in Employment Act, state agency findings of fact that have not been judicially reviewed have preclusive effect.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1895

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

ANGELO J. SOLIMINO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case presents the question whether, in a federal court action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, common law principles of preclusion apply to state agency findings that have not been judicially reviewed. The Court's resolution of this question will affect administration and enforcement of the ADEA.

The United States and the Equal Employment Opportunity Commission (EEOC) have a substantial interest in the interpretation and enforcement of federal laws prohibiting employment discrimination, including the ADEA. The EEOC is the federal

agency primarily responsible for administering the ADEA. In carrying out its responsibilities, the EEOC has entered into worksharing agreements with 46 state and local agencies that have authority to enforce state and local laws prohibiting age discrimination in employment. Under a typical agreement, the EEOC refers certain age discrimination claims to state and local agencies. See *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988) (describing worksharing agreements under Title VII). The EEOC believes that such agreements further Congress's intent to afford the States an opportunity to resolve age discrimination complaints promptly and without undue inconvenience or expense. The agreements also conserve the EEOC's limited enforcement resources.

The EEOC's decision to enter into worksharing agreements under the ADEA was based on its understanding that judicially unreviewed determinations by state agencies have no preclusive effect in subsequent actions under the ADEA or in proceedings before the EEOC. The EEOC takes the position that state agency factfinding should be accorded substantial weight, but not preclusive effect. If the Court were to adopt petitioner's position in this case, the EEOC would be compelled to consider modifying or abandoning its worksharing agreements under the ADEA.

In our view, application of common law rules of preclusion under the ADEA to judicially unreviewed determinations of state agencies would be inconsistent with the language and purpose of the ADEA, would interfere with the EEOC's exercise of its enforcement responsibilities, and would undermine private enforcement. Accordingly, we believe that the decision of the court of appeals is correct.

STATEMENT

1. Petitioner Astoria Federal Savings and Loan Association employed respondent Angelo J. Solimino from October 4, 1945 until March 5, 1982. On March 5, 1982, petitioner terminated respondent's employment as Vice President of the Mortgage Origination Department. Respondent was 63 years old at the time. J.A. 141-142.

On March 18, 1982, respondent filed a charge of age discrimination with the EEOC. J.A. 141. Pursuant to a worksharing agreement between the EEOC and the New York State Division of Human Rights (DHR), the EEOC referred respondent's case to the DHR for investigation and attempted resolution under the New York Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.* (McKinney 1982 & Supp. 1990). Pet. App. A3.

On January 25, 1983, following a hearing at which petitioner and respondent each were represented by counsel, the DHR dismissed respondent's complaint, finding that the record before it contained no evidence that respondent's employment was terminated because of his age. J.A. 89-91. Respondent requested review of the DHR's decision by the New York State Human Rights Appeal Board. J.A. 130. On May 30, 1984, the Board affirmed the DHR's decision, concluding that the DHR's dismissal of respondent's complaint "was not arbitrary, capricious, or characterized by an abuse of discretion."[1] J.A. 96-97. The

[1] Petitioner asserts that "[t]he DHR's handling of the matter resulted in a consolidated, concurrent disposition of the case under federal and state laws." Pet. Br. 4 n.2. Although the court of appeals' opinion states that the DHR treated the case "as a potential violation of both the ADEA and New York State Human Rights Law," Pet. App. A3, the DHR's

Board's notice to respondent informing him of its decision stated that he might lose his right to proceed in federal court if he elected to appeal the state administrative determination in state court. J.A. 95 (citing *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982)). Solimino did not seek judicial review of the Board's decision.[2] Pet. App. A4.

2. On February 21, 1985, respondent filed an action in the United States District Court for the Eastern District of New York alleging that petitioner had discriminated against him on the basis of age, in

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Determination and Order stated only that respondent's complaint charged a violation of New York law. J.A. 89. And the Appeal Board stated that it was discharging its "narrow function" under the State Human Rights Law. J.A. 96. Consequently, there is no basis for petitioner's suggestion that the DHR or the Appeal Board decided respondent's claim under the ADEA. Although this case therefore involves only issue preclusion, petitioner's arguments would appear to apply equally to claim and issue preclusion.

[2] Under the law then in effect, judicial review of Board decisions was available in the Appellate Division of the New York State Supreme Court. 1984 N.Y. Laws ch. 83, § 3. The Appellate Division accorded the DHR's findings of fact conclusive effect "if supported by sufficient evidence on the record considered as a whole." *Ibid.* The Board was abolished in 1984, subsequent to its affirmance of the DHR decision in this case. 1984 N.Y. Laws ch. 83, § 2. Judicial review of DHR decisions is now obtained by initiating a proceeding in the New York Supreme Court for the appropriate county. N.Y. Exec. Laws § 298 (McKinney 1982 & Supp. 1990). As before, the DHR's findings of fact are conclusive "if supported by sufficient evidence" in the record. *Ibid.*

Although respondent did not appeal the DHR's disposition of his age discrimination claim, he filed an action in state court alleging various other causes of action, including wrongful termination, prima facie tort, perjury and conspiracy. The state court dismissed this action for failure to state a claim. J.A. 99-102.

violation of the ADEA, by denying him salary increases and promotions, and by terminating him. J.A. 142. Petitioner moved for summary judgment, arguing that respondent's action was precluded by the DHR's dismissal of his complaint and by the statute of limitations. Pet. App. A4.

The district court granted summary judgment for petitioner on the ground that respondent's action was precluded by the DHR's determination.[3] J.A. 156-157. The district court noted that two courts of appeals had reached opposite conclusions on the question whether judicially unreviewed agency factfinding has preclusive effect in actions under the ADEA. J.A. 146 (citing *Stillians* v. *Iowa*, 843 F.2d 276 (8th Cir. 1988); *Duggan* v. *Board of Education*, 818 F.2d 1291 (7th Cir. 1987)).[4] The court observed that this conflict arose from "divergent interpretations of

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[3] The district court declined to grant summary judgment on the statute of limitations issue because it concluded that there were disputed issues of fact concerning the date on which the cause of action accrued. J.A. 145. That issue is not before this Court. Pet. Br. 6 n.5.

[4] See also *Delgado* v. *Lockheed-Georgia Co.*, 815 F.2d 641, 646 (11th Cir. 1987) (finding arguments for denying preclusion "persuasive"); *Mack* v. *South Bay Beer Distrib., Inc.*, 798 F.2d 1279 (9th Cir. 1986) (assuming, without argument, that unreviewed state administrative decision could have preclusive effect). The district courts are also divided. Compare *Heckman* v. *State University*, 737 F. Supp. 177 (N.D.N.Y. 1990) (no preclusion) and *Ibrahim* v. *New York State Department of Health*, 692 F. Supp. 1471 (E.D.N.Y. 1988) (same) with *Garner* v. *Unicare Health Facilities, Inc.*, 651 F. Supp. 422 (E.D. Wis. 1987) (preclusion); *Corrente* v. *St. Joseph's Hosp. & Health Center*, 730 F. Supp. 493 (N.D.N.Y. 1990) (assuming unreviewed state administrative decision can have preclusive effect); and *Frank* v. *Capital Cities Communications, Inc.*, 689 F. Supp. 334 (S.D.N.Y. 1988) (same).

[this Court's] decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986)." J.A. 147. The district court's analysis largely adopted the Eighth Circuit's approach in *Stillians*.

The district court understood *Stillians* to "expand[] upon [a] concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident." J.A. 148. This presumption, in the court's view, could be overcome only by statutory language or legislative history that (1) "actually addresses" whether facts found by an agency but not reviewed by a court are to have preclusive effect, and (2) "accords them something less than preclusive effect." *Ibid.* Applying this test, the court concluded that judicially unreviewed administrative agency factfinding has preclusive effect under the ADEA. The district court observed that the ADEA does not "contain[] any provision—like the 'substantial weight' provision of Title VII."[5] J.A. 154. The court deemed irrelevant the provisions in the ADEA that provide for state agency proceedings to be superseded by actions under the statute (29 U.S.C. 633(a)) and that permit concurrent investigations of discrimination claims by state agencies and the EEOC (29 U.S.C. 633(b)). In the district court's view, these "statutory deferral mechanisms [were] not an accurate indicator of Congressional intent." J.A. 154.

[5] Title VII's "substantial weight" provision requires the EEOC to "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 42 U.S.C. 2000e-5(b).

The court further held that the DHR's proceedings satisfied the requirements for administrative preclusion. The DHR acted in a judicial capacity, gave the parties an adequate opportunity to litigate disputed facts, and made findings of fact that would be accorded preclusive effect in state courts. J.A. 155-156. Finally, the court held, DHR's factual findings precluded respondent from proving a violation of the ADEA. J.A. 156-157.

3. The court of appeals reversed and remanded. Pet. App. A1-A13. The court viewed the issue as one of congressional intent. *Id.* at A6. It rejected the notion that "the absence of the phrase 'substantial weight' from the ADEA disposes of the preclusion issue." *Id.* at A12. Although "the presence of the [substantial weight] provision is dispositive because logically incompatible with preclusion," *id.* at A12, n.7, "other considerations may also justify the conclusion that Congress intended no preclusion." *Ibid.*

One such consideration, the court said, is the ADEA's deferral mechanism. Section 14(b) of the ADEA provides that grievants may not file suit "before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated." Pet. App. A6 (quoting 29 U.S.C. 633(b)). The court found further evidence that Congress did not intend preclusion in the ADEA provisions that permit state agencies and the EEOC to investigate discrimination complaints concurrently or subsequently. *Ibid.* (citing 29 U.S.C. 626(d) and 633(b)). "If Congress had intended preclusion from judicially unreviewed state agency findings, * * * 'the concurrent or subsequent EEOC investigation would be superfluous.'" Pet. App. A6-A7 (quoting *Duggan*, 818 F.2d at 1295).

In addition, the court determined that preclusion would be inconsistent with the purpose of Section 14(a), which provides that "upon commencement of action under this chapter such action shall supersede any State action," 29 U.S.C. 633(a). The court of appeals observed that "Congress enacted the sixty-day deferral mechanism * * * 'to screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings.'" Pet. App. A7 (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979) (emphasis added by the court of appeals)). These provisions of the ADEA, the court concluded, showed that Congress did not intend to bar federal court consideration of complaints that were not settled to the grievant's satisfaction. Pet. App. A7-A8. Additionally, the court of appeals found support for its interpretation in the EEOC's practice of referring certain age discrimination charges to state agencies for investigation. *Id.* at A9. The court considered it unlikely that "a grievant who is obligated to file a complaint with the EEOC * * * and who has no control over the EEOC's decision to refer the case to the state agency should be bound by an adverse, judicially unreviewed [state agency] decision." *Id.* at A10.

In addition to examining the ADEA, the court of appeals looked to principles enunciated by this Court in construing Title VII, 42 U.S.C. 2000e *et seq.* The court of appeals observed that in *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. at 470 n.7, this Court indicated "that decisions of the EEOC do not preclude *de novo* fact-finding by a federal court and that Congress could not have intended the federal courts to be bound by the fact-finding of state administrative agencies when they are not bound by findings

of the EEOC." Pet. App. A8. The Court in *Kremer* also stated that "unreviewed administrative determinations by state agencies * * * should not preclude [*de novo* federal court] review even if such a decision were to be afforded preclusive effect in a State's own courts." Pet. App. A9 (quoting *Kremer*, 456 U.S. at 470 n.7). These principles, the court of appeals determined, "apply as well to ADEA cases."[6] *Ibid.*

As to the absence of a counterpart to Title VII's "substantial weight" provision, the court of appeals observed that Congress added that provision to Title VII in 1972 because it concluded that the EEOC was not according sufficient weight to state agency findings. Pet. App. A12-A13 (citing *Kremer*, 456 U.S. at 474-475 & n.16). In contrast, when Congress amended the ADEA in 1986, the EEOC was already according substantial weight to state agency findings in age discrimination cases as a matter of administrative policy. Pet. App. A13. Congress's failure to add a "substantial weight" provision to the ADEA therefore was consistent with the view that unreviewed agency findings do not have preclusive effect. *Id.* at A13 n.9.

The court noted that the EEOC shared its view, and that the EEOC's interpretation was entitled to

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[6] In the court of appeals' view, the differences between the ADEA and Title VII indicate that principles regarding preclusion enunciated in the Title VII context apply *a fortiori* when interpreting the ADEA. Pet. App. A10-A11. The court noted that (1) ADEA grievants are required to wait less time than Title VII grievants between commencing state agency proceedings and filing an action under the federal statute; and (2) under Title VII, state agencies enjoy an initial period of exclusive jurisdiction over Title VII claims that they are not afforded under the ADEA. *Id.* at A11.

deference in light of the agency's responsibility for enforcing the ADEA. Pet. App. A12 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). Deference was particularly appropriate, the court noted, because the EEOC adopted this interpretation prior to 1986, when Congress amended the ADEA extensively but did not disturb that interpretation. Pet. App. A12, A13 n.9 (citing EEOC Compl. Man. (CCH) ¶ 285 (May 1985)).

SUMMARY OF ARGUMENT

The court of appeals correctly applied the analytical framework of *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986), to conclude that common law rules of preclusion do not apply to judicially unreviewed state agency determinations in actions under the ADEA. In *Elliott*, this Court looked to the language and legislative history of the particular statutes at issue to determine whether applying common law rules of preclusion to judicially unreviewed state agency determinations "would be consistent with Congress' intent." *Id.* at 796. The district court was incorrect in deriving from *Elliott* a general rule that common law principles of preclusion apply unless Congress "actually addresses the issue of the proper weight to be afforded state agency findings, and accords them something less than preclusive effect." Pet. App. A21. Nor is petitioner correct in asserting that, under *Elliott*, indications that Congress did not intend common law rules of administrative preclusion to apply under a particular statute must be "unequivocal" or "explicit." *Ibid.* Petitioner's formulation would be more appropriate if the question were whether to accord preclusive effect to the decisions and records of state courts, because 28 U.S.C. 1738 provides that such judgments and records are to be given preclusive effect. In contrast, the Court's analysis in *Elliott* indicates that the question whether common law rules of preclusion apply under a particular statute to administrative determinations is an ordinary question of statutory interpretation that does not call for application of a "clear statement" rule.

In any event, the language and structure of the ADEA clearly indicate that application of the common law rules of preclusion to unreviewed state determinations in actions under the ADEA would be inconsistent with Congress's intent. See Pet. App. A21. First, Section 14(b) of the ADEA provides that, where a state agency is authorized to consider claims of age discrimination, a grievant may not file an action under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." 29 U.S.C. 633(b). The language of this provision indicates that Congress intended grievants to be able to bring suit under the ADEA after a state administrative proceeding has terminated in a decision adverse to the grievant. Moreover, this Court has recognized that the purpose of Section 14(b) is to "screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979). Foreclosing judicial review of age discrimination claims that are not settled to the grievant's satisfaction would defeat this purpose. Similarly, there would be no reason for Congress to have authorized grievants to file charges with the EEOC within 30 days after the termination of state pro-

ceedings, 29 U.S.C. 626(d)(2), if the unreviewed determinations of state administrative agencies were entitled to preclusive effect.

It is true that the ADEA contains no counterpart to Section 706(b) of Title VII, which directs the EEOC to give "substantial weight" to findings of state and local agencies. 42 U.S.C. 2000e-5(b). But the absence of such a provision does not decide the question presented here. Section 706(b) was only one of the factors the Court considered in *Elliott*. Moreover, Congress added Section 706(b) to Title VII in 1972 because it believed the EEOC was not giving sufficient weight to the findings of state and local agencies. By the time Congress enacted amendments to the ADEA in 1986, the EEOC had adopted a policy of according substantial weight to state and local agency findings on age discrimination claims. Thus, Congress had no reason to enact a counterpart to Section 706(b), because the EEOC had adopted a "substantial weight" rule on its own.

Preclusion also is inconsistent with Congress's intent to allow *de novo* judicial review of ADEA claims. The Court relied on *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) in deciding the parallel question under Title VII (see *Elliott*, 478 U.S. at 796). The courts of appeals uniformly hold that the rule of *Chandler* is applicable under the ADEA, and a federal statute (5 U.S.C. 7703(b)(2)) expressly allows federal employees to file actions under the ADEA following adverse administrative decisions.

Denying preclusive effect to unreviewed state agency determinations would not reduce state proceedings to insignificance. Grievants who are satisfied by state administrative proceedings have no reason to bring a federal action. Grievants whose claims are rejected after fair proceedings may decide

to accept the outcome as reasonable and forgo further litigation. Grievants who bring suit may stipulate to facts found by the state administrative agency. And if they do not, administrative findings generally are admissible under Fed. R. Evid. 803(8)(C). On the other hand, if administrative determinations had preclusive effect, grievants who were in doubt about the outcome of state proceedings would be encouraged to abandon them as soon as the sixty-day period had expired.

Although denying preclusive effect to unreviewed state agency determinations may result in duplicative litigation—the result of any decision denying preclusive effect—that policy choice was Congress's to make. Congress chose to provide for *de novo* judicial consideration of ADEA claims.

ARGUMENT

UNREVIEWED STATE AGENCY DETERMINATIONS DO NOT HAVE PRECLUSIVE EFFECT IN AN ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Common Law Rules of Preclusion Do Not Apply if Preclusion Is Inconsistent With Congressional Intent

In *University of Tennessee* v. *Elliott*, *supra*, this Court held that common law rules of preclusion apply to unreviewed state agency determinations in actions under 42 U.S.C. 1983, but not to actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In this case, the court of appeals correctly applied the analytical framework of *Elliott* to conclude that principles of preclusion do not apply to unreviewed state agency determinations in actions under the ADEA.

This Court framed the question in *Elliott* as whether applying "a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII [and Section 1983]."[7] 478 U.S. at 796. The Court observed that it had "frequently fashioned common-law rules of preclusion," *id.* at 794, and proceeded to consider "whether a rule of preclusion [was] appropriate" in actions under the two statutes at issue. *Id.* at 795.

In determining that Congress did not intend common law rules of preclusion to apply to unreviewed state determinations under Title VII, the Court relied in part on its decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). *Chandler* held that a federal employee whose Title VII claim was rejected by her employing agency following an administrative hearing was entitled to a trial *de novo* in federal court. In reaching that conclusion, the Court in *Elliott* observed, *Chandler* considered both the language and the legislative history of the 1972 amendments to Title VII. 478 U.S. at 795. The Court in *Elliott* also relied on its earlier statement in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), that the legislative history "manifests a congressional intent" to allow grievants to pursue independently their rights under both Title VII and other applicable statutes. 478 U.S. at 796 n.5.

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[7] The Court rejected the contention that preclusion presumptively applies to state administrative determinations, noting that the presumption against implied repeal of statutes does not arise in this context because 28 U.S.C. 1738, which governs the preclusive effect to be accorded the judgments and records of state courts, does not apply to administrative determinations that have not been judicially reviewed. 478 U.S. at 794.

In analyzing the preclusion question under Section 1983, the Court quoted its statements in *Allen* v. *McCurry*, 449 U.S. 90 (1980) (made in the course of a determination that 28 U.S.C. 1738 applies in actions under 42 U.S.C. 1983) that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion," and "the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion." 478 U.S. at 797 (quoting 449 U.S. at 97-98). The Court saw "no reason to suppose" that, in enacting Section 1983, Congress "wished to foreclose the adaptation of traditional principles of preclusion to * * * the burgeoning use of administrative adjudication in the 20th century." 478 U.S. at 797.

We disagree with petitioner's suggestion (Pet. Br. 11-13) that the Court adopted an across-the-board "clear statement" rule in *Elliott*. There is no basis in *Elliott* for petitioner's assertions that common law rules of claim and issue preclusion apply absent "unequivocal direction" from Congress (Pet. Br. 11) or an "explicit showing of Congressional intent" (*id.* at 13) to the contrary. Rather, as petitioner itself recognizes at one point (*id.* at 12), *Elliott* approached the preclusion question as an ordinary issue of statutory interpretation, calling for examination of the language and legislative history of the statute at issue to determine whether application of common law rules of preclusion to administrative determinations "would be inconsistent with Congress' intent." 478 U.S. at 796. The "clear statement" language on which petitioner relies was drawn from *Allen* v. *McCurry*, *supra*, where the question was whether Congress had somehow repealed 28

U.S.C. 1738 in enacting Section 1983. As both the Court's analysis and its holding in *Elliott* indicate, no such clear statement is required when the question is simply whether Congress intended common law preclusion to apply.

Similarly, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), also cited by petitioner (Pet. Br. 10), does not establish a general rule requiring federal courts to give preclusive effect to all state administrative determinations. *Utah Construction* addressed the preclusive effect of a particular agency's factual determinations under a particular statutory regime. See 384 U.S. at 421 ("the decision here rests upon the agreement of the parties as modified by the Wunderlich Act"). *Utah Construction*, like *Elliott*, indicates that the preclusion analysis turns on the congressional intent underlying a particular statutory regime. *Id.* at 421 n.18. See Restatement (Second) of Judgments § 83 (3) and (4) (1982) (administrative preclusion inappropriate where "the scheme of remedies permits assertion of second claim notwithstanding the adjudication of the first claim," or where preclusion "would be incompatible with a legislative policy."); 4 K. Davis, *Administrative Law Treatise* § 21.5 (2d ed. 1983). See also *Brown* v. *Felsen*, 442 U.S. 127, 136 (1978) (applying claim preclusion in bankruptcy proceedings would be inconsistent with congressional intent).[8]

[8] Petitioner cites the general rules of statutory construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986), and that "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Pet. Br. 11 (quoting *Stillians*, 843 F.2d at 280). Here, the question is not whether to change the common law rules of preclusion, but whether to apply those rules under a particular statute. Moreover, the ADEA did not "invade" the common law (as the statute at issue in *Isbrandtsen* invaded the general maritime law), but rather created new statutory remedies for age discrimination in employment.

B. Preclusion Is Inconsistent With the Language and Structure of the ADEA

Section 14(b) of the ADEA provides that grievants in "deferral States" (in which state agencies are authorized to redress claims of age discrimination in employment) may not file an action under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated."[9] A grievant who prevails in state administrative proceedings has no reason to bring an action in federal court. Consequently, the plain language of Section 14(b) indicates that Congress intended to allow grievants to bring an action under the ADEA after state administrative proceedings

[9] Section 14(b) provides:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law.

29 U.S.C. 633(b).

have terminated in a decision adverse to the grievant.

This reading of the language of the ADEA's deferral provision is consistent with its purpose. In *Oscar Mayer & Co.* v. *Evans*, the Court noted that Section 14(b) "is almost *in haec verba* with § 706 (c) of Title VII." 441 U.S. at 756. The Court concluded that the two provisions were intended to "screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings." *Ibid.* (emphasis added). According preclusive effect to unreviewed agency proceedings would defeat this purpose by foreclosing judicial review of claims that were *not* settled to the grievant's satisfaction in state administrative proceedings.[10]

Similarly, Section 7(d)(2) of the ADEA, 29 U.S.C. 626(d)(2), provides that a grievant in a

[10] Petitioner broadly asserts (Pet. Br. 17, 24) that the ADEA should not be compared to Title VII. But this Court repeatedly has observed that the substantive, as well as some of the procedural, provisions of the ADEA are derived from Title VII. See *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988); *Oscar Mayer*, 441 U.S. at 755; *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985); *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); see also *Yellow Freight Sys., Inc.* v. *Donnelly*, 110 S. Ct. 1566, 1570 (1990). It is true that rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* 29 U.S.C. 626(b). But "the remedial provisions of [the ADEA and the FLSA] are not identical," *Trans World Airlines* v. *Thurston*, 469 U.S. at 125. In particular, Section 14(b) of the ADEA is derived "almost *in haec verba*" from Title VII rather than the FLSA. *Oscar Mayer*, 441 U.S. at 756. Thus, in the context of this case, reliance on decisions under Title VII is appropriate.

State with an age discrimination law must file a charge with the EEOC "within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receipt by the individual of notice of the termination of proceedings under State law, whichever is earlier." If Congress had intended unreviewed state administrative determinations to have preclusive effect, it would have made little sense to provide for the filing of charges with the EEOC following termination of state proceedings. At that point, review by the EEOC would be largely or wholly "superfluous."[11] See *Duggan*, 818 F.2d at 1295.

Petitioner is wrong in asserting (Pet. Br. 22, 26) that, under its view of preclusion, grievants would always have an opportunity to decide whether to pursue an action under the ADEA in federal court. Under Section 14(b), grievants in deferral States are required to commence state proceedings. See *Oscar Mayer*, 441 U.S. at 755 (grievants do not have an option whether to resort to state proceedings). Moreover, grievants who file complaints with the EEOC cannot prevent the EEOC from referring their complaints to a state or local agency under a work-

[11] Section 7(d)(2) of the ADEA generally parallels Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e). Title VII's deferral provision provides for a 60-day period of exclusive state jurisdiction. The ADEA, in contrast, allows grievants to proceed either concurrently or consecutively in both state and federal administrative agencies. See *Yellow Freight Sys., Inc.* v. *Donnelly*, 110 S. Ct. 1566, 1570 (1990). To the extent this difference is relevant here, it suggests that Congress was less inclined to defer to state agencies under the ADEA than under Title VII. See *Duggan*, 818 F.2d at 1295-1296.

sharing agreement between the EEOC and the State. If the state agency decides the age discrimination claim within the 60-day period provided by Section 14(b), under petitioner's view, principles of preclusion would prevent the grievant from ever obtaining *de novo* review in federal court. Although petitioner asserts (Pet. Br. 20) that 60 days is "scarcely enough time to permit the EEOC or the state agency to explore voluntary conciliation," Congress in fact expected state agencies to decide many discrimination complaints in sixty days or less—that is why it chose sixty days as the deferral period. See *Oscar Mayer*, 441 U.S. at 757-758 (quoting 110 Cong. Rec. 13,087 (1964) (statement of Sen. Dirksen) ("at the local level * * * many cases are disposed of in a matter of days, and certainly not more than a few weeks.")). Thus, petitioner is incorrect in surmising (Pet. Br. 20-21) that Section 14(b)'s reference to "earlier terminated" proceedings refers only to proceedings in which the state agency does not make findings of fact or a determination on the merits.

Petitioner also advances the iconoclastic argument that the ADEA does not authorize state agencies to make findings of fact or determinations of the merits without the grievant's consent, and that therefore grievants should be bound by any such findings.[12] See Pet. Br. 23-25. This argument is flawed in several

[12] It has been the EEOC's practice since 1987 to issue written determinations on ADEA charges similar to its written determinations on Title VII charges. See EEOC Compl. Man. (CCH) ¶ 255 (1988). From 1981 until 1987, the EEOC issued "letters of violation" when it determined that ADEA charges had merit and "closure letters," which did not discuss the merits, when it determined that ADEA charges lacked merit. See EEOC Compl. Man. (CCH) ¶¶ 204, 240 (1981). Prior to 1978, the Secretary of Labor had responsibility for enforcing the ADEA. It is our understanding that the Secretary issued no written determinations of age discrimination charges.

respects. The ADEA provides that the EEOC is directed to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," 29 U.S.C. 626(d), to investigate and keep appropriate records, Section 626(a), and to bring actions to enforce the rights of employees under the ADEA, Section 626(b)-(c). In order to carry out these functions, the EEOC —and the state agencies with which the EEOC is authorized to share enforcement responsibility, see 29 U.S.C. 625(b)—must make an informal determination of the merits of age discrimination complaints. Factfinding by the EEOC or a state administrative agency may reduce the areas of disagreement between employer and employee, and therefore is a useful and appropriate method of conciliation. If anything, the fact that the ADEA, unlike Title VII, does not expressly provide for formal findings by administrative agencies suggests that according preclusive effect to such findings would be even less appropriate under the ADEA than under Title VII. In any event, nothing in the ADEA purports to bar state agencies from entering findings of fact pursuant to their authority under *state* law.

The deferral provisions of the ADEA strongly indicate that Congress did not intend to apply common law rules of preclusion to unreviewed state agency determinations. As the Seventh Circuit observed in *Duggan*, "[g]iven the multiple forums provided for in Title VII and the ADEA and the place of the state agency and EEOC in the process as informal agents of reconciliation, it is unlikely that Congress

intended the process to effectively stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." [13] 818 F.2d at 1295. And as this Court observed in *Oscar Mayer*, "[p]rior resort to the state remedy would not impair the availability of the federal remedy, for the two are supplementary, not mutually exclusive." 411 U.S. at 764. [14]

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[13] The district court believed that, if Solimino had brought an age discrimination action in state court, DHR's judicially unreviewed ruling would have been accorded preclusive effect under state law. Pet. App. A28-A29 (citing *Kirkland* v. *City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987)). Assuming this is so, it does not resolve the question whether Congress intended to accord such findings the same effect in federal court. As this Court observed in *Kremer* with respect to Title VII, "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review *even if such a decision were to be afforded preclusive effect in a State's own courts.*" 456 U.S. at 470 n.7 (emphasis added).

[14] Section 14(a) of the ADEA provides that "upon commencement of action under this chapter such action shall supersede any State action." 29 U.S.C. 633(a). Petitioner incorrectly asserts (Pet. Br. 20) that once a state administrative agency renders a final decision, there is no longer any "State action" to supersede. It is clear both from the plain language of Section 14(a) and the legislative history that Congress intended the filing of an action under the ADEA to supersede pending state court proceedings as well as pending administrative proceedings. See S. Rep. No. 723, 90th Cong., 1st Sess. 6 (1967) (Section 14(a) would affect "suits in * * * State courts"). In New York, as in most States with laws prohibiting age discrimination in employment, a grievant is entitled to state court review of state administrative determinations. See note 2, *supra*. Thus, petitioner's approach would lead to the bizarre result that grievants who wished to file actions in federal court following the adverse decision

Section 706(b) of Title VII requires the EEOC to give "substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law." 42 U.S.C. 2000e-5(b). In *Elliott*, this Court recognized that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." 478 U.S. at 795 (citing *Kremer*, 456 U.S. at 470 n.7). True enough. But the absence of such a provision from the ADEA does not compel a contrary conclusion. Section 706(b) of Title VII was just one of the factors that the Court relied on in *Elliott*. See 478 U.S. at 795-796. In this case, other factors—the ADEA's deferral provisions, and the fact that Congress intended grievants to be able to obtain *de novo* judicial review of age discrimination claims, see pp. 24-26, *infra*—lead to the conclusion that unreviewed administrative determinations have no preclusive effect under the ADEA.

The district court was mistaken in reasoning that "had Congress wanted to demonstrate an intent to displace common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII." J.A. 155. Congress added Section 2000e-5(b) to Title VII by amendment in 1972 for the purpose of increasing the deference paid to state agency decisions. *Kremer*, 456 U.S. at 470 n.8. Prior to the amendment, the Court noted, the EEOC was

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of a state agency could do so only by filing a purely protective petition for review in state court (to keep their state action alive), and then immediately filing in federal court, before any decision in state court.

"free to ignore state administrative decisions." *Id.* at 475 n.16. See also *Duggan*, 818 F.2d at 1297.

In 1982, well before Congress enacted the 1986 amendments to the ADEA, the EEOC adopted a policy of according substantial weight to unreviewed factfinding by state agencies concerning age discrimination claims. See EEOC Order 916, App. C: ADEA Contract Rev. Man. (Apr. 1982); EEOC Compl. Man. (CCH) ¶ 285 (May 1985). Thus, Congress had no reason to enact a counterpart to Title VII's substantial weight provision, because the EEOC already accorded substantial weight to unreviewed factfinding by state agencies concerning age discrimination claims as a matter of administrative policy. In this instance at least, Congress followed the common-sense aphorism of not fixing something that was not broken. Indeed, the lack of congressional action suggests, if anything, that Congress acquiesced in the EEOC's administrative practice. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

C. Preclusion Is Inconsistent With the Congress's Intent To Allow *De Novo* Judicial Review of ADEA Claims

In *University of Tennessee* v. *Elliott*, this Court concluded that applying common law rules of preclusion to unreviewed administrative determinations in a Title VII case "would be contrary to this Court's holding in *Chandler*" that federal employees with Title VII claims are entitled to *de novo* review of their claims in federal court. 478 U.S. at 796. The same argument applies under the ADEA. The courts of appeals have held that employees, both federal and non-federal, are entitled to *de novo* review of their ADEA claims following an adverse administrative decision. See *Rosenfield* v. *Department of the Army*, 769 F.2d 237, 239 (4th Cir. 1985) (federal

employees); *Nabors* v. *United States*, 568 F.2d 657, 660 (9th Cir. 1978) (same); *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635, 640 (2d Cir. 1985), cert. denied, 474 U.S. 1109 (1986) (private employees); *Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544, 548 (9th Cir. 1983), aff'd, 472 U.S. 400 (1985) (same); *EEOC* v. *County of Calumet*, 686 F.2d 1249, 1253-1256 (7th Cir. 1982) (same). In addition, Congress has provided expressly that federal employees who litigate age discrimination claims before the EEOC and the Merit Systems Protection Board have a right to a trial *de novo* in ADEA actions. See 5 U.S.C. 7703(b)(2).[15]

In sum, petitioner is wrong in asserting (Pet. Br. 17) that examination of the ADEA yields "mere silence" on the preclusive effect to be accorded to unreviewed state administrative determinations. The ADEA's deferral provisions, as well as the principle

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[15] The legislative history of the ADEA further reinforces the conclusion that Congress intended to allow grievants to obtain judicial determinations of age discrimination claims. Initial proposals for a federal age discrimination statute provided for administrative enforcement, with only appellate review by the courts. This procedure was replaced by the judicial enforcement scheme adopted in the ADEA. See 113 Cong. Rec. 7076 (1967). In addition, the legislative history suggests that Congress enacted the ADEA because it concluded that state age discrimination laws were ineffective or inadequately enforced. See 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Javits); *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964, at 10, 21 (1965), *reprinted in* EEOC, *Legislative History of the Age Discrimination Act of 1967*, at 27, 38 (1981). In view of this legislative history, it is implausible that Congress intended to allow unreviewed state administrative determinations to foreclose judicial review.

that grievants are entitled to *de novo* judicial review of claims under the ADEA, demonstrate that application of common law rules of preclusion would be inconsistent with the statutory scheme enacted by Congress. In any event, the EEOC's determination that state administrative findings are not preclusive under the ADEA is a reasonable interpretation of the statute and as such is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

D. Petitioner's Policy Arguments Should Not Be Substituted for the Requirements of the ADEA

Contrary to the Eighth Circuit's view (*Stillians*, 843 F.2d at 282), denying preclusive effect to unreviewed state agency determinations does not reduce state agency proceedings to nothing more than "an opportunity for the [grievant] to test his case." Grievants who prevail in state agency proceedings will have no reason to bring an action in federal court. Grievants who lose in state administrative proceedings that they perceive to be fair may decide to accept the unfavorable outcome and forgo additional litigation. In addition, prior state proceedings are likely to simplify subsequent litigation in federal court. Less discovery should be needed in most cases, and the issues will have been narrowed by the prior proceeding. Grievants who bring a federal action may stipulate to issues of fact that were determined in the state proceeding. Absent a stipulation, prior administrative findings may be admitted as evidence in federal actions under Fed. R. Evid. 803(8)(C). See *Chandler*, 425 U.S. at 863 n.39; cf. *Alexander*, 415 U.S. at 60 n.21.

On the other hand, if unreviewed state agency determinations had preclusive effect, grievants who

were in any doubt about the outcome of state administrative proceedings would have an incentive to abandon them after 60 days in order to preserve their right to bring an action in federal court. Many grievants could be expected to "bypass the opportunity for state EEOC exhaustion, which serves to terminate many cases without federal litigation." *Stillians*, 843 F.2d at 283 (Lay, C.J., dissenting). This would frustrate Congress's intent to encourage full use of state remedies in order to reduce the number of cases in which resort to the federal courts is necessary. See *Oscar Mayer*, 441 U.S. at 756. Cf. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 65-66 (1980) (Title VII). It would also upset the division of enforcement responsibilities between the EEOC and state agencies currently achieved through worksharing agreements, and increase the number of cases filed in federal courts.

To be sure, our understanding of the ADEA's deferral mechanism imputes to Congress an intent to favor unsatisfied employees over employers who have successfully defended against charges of age discrimination before a state agency. This is a choice that Congress made by giving employees, and not their employers, the right to opt out of agency proceedings after 60 days. In addition, the result for which we are arguing may lead to duplicative litigation in federal court following the completion of what may well have been entirely fair and comprehensive state proceedings. Of course, any decision denying preclusion carries the potential for duplicative litigation. Whatever the wisdom of this result, Congress is entitled to make this policy choice. In enacting the ADEA, Congress chose to adopt a statutory scheme

that is inconsistent with common law rules of administrative preclusion.[16]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[16] The court of appeals did not reach the question whether DHR's proceedings satisfied the requirements for administrative preclusion. In accordance with *Elliott*, this question should be left for the courts below on remand if this Court decides to reverse the court of appeals' decision. See *Elliott*, 478 U.S. at 799 n.8.

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In The

Supreme Court of the United States

October Term, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether preclusive effect should be given in an age discrimination case brought under the Age Discrimination in Employment Act ("ADEA") to the decision of the appropriate state administrative agency, as affirmed by the appropriate appeal board, where the parties were afforded a full and fair hearing before the state agency?

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INTEREST OF AMICUS[1]

Amicus Atlantic Legal Foundation is a non profit, public interest legal foundation, incorporated in Pennsylvania and headquartered in New York City. Its mandate is to present a balanced articulation of the public interest in litigations with broad impact and serious, often constitutional issues involved. The Foundation often is a spokesman for the interests of private enterprise. It has appeared as amicus curiae before this Court in a number of cases involving public interest issues, including *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470 (1987); *Johnson v. Transportation Agency, Santa Clara County, Cal.,* 480 U.S. 616 (1987); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989); and *Pacific Mutual Life Insurance Company v. Haslip,* No. 89-1279 (Oct. Term, 1989).

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[1]. Pursuant to Rule 36 of the Rules of this Court, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed with the clerk of this Court.

STATEMENT OF THE CASE

The facts underlying and the procedural history of this case are fully set forth in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and in the brief for the United States and the Equal Employment Opportunity Commission ("EEOC") submitted at the request of this Court. We understand that Petitioner's brief on the merits will fully state these matters. We will not burden the Court with a repetition of the facts and procedural background, but will merely highlight the most relevant salient points.

Respondent Angelo J. Solimino ("Solimino") was employed by Petitioner Astoria Federal Savings and Loan Association ("Astoria") from October 4, 1945 through March 5, 1982, when, age 63, he was terminated as Vice-President of the Mortgage Origination Department of Astoria. A3[2].

On March 18, 1982, Solimino filed an age discrimination charge with the EEOC. *Ibid.* The EEOC, pursuant to a "worksharing" agreement, referred Solimino's complaint to the New York State Department of Human Rights ("DHR"). *Ibid.*

The DHR assigned the matter to a staff member for investigation. The DHR specialist investigated the charge, issued an Investigative Report on October 5, 1982 which summarized the

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[2]. References "A__" are to the Appendix to the Petition for Certiorari.

positions of the parties and the evidence submitted, and conducted a hearing on November 19, 1982. *Ibid.* The hearing was attended by both parties and their counsel, and, at the request of Solimino, witnesses gave sworn testimony and a stenographic transcript was made. *Ibid.*

On January 25, 1983 the DHR dismissed the complaint, finding no probable cause. Ibid. The New York State Human Rights Appeal Board, after submission by Solimino of a brief and oral argument, affirmed this determination on May 24, 1984. A3-4. Solimino did not seek judicial review of the DHR's finding and the Appeal Board's affirmance. A4.

Solimino commenced this action in the United States District Court for the Eastern District of New York on February 21, 1985. A4. The District Court dismissed the complaint on grounds of administrative estoppel. A19, 715 F.Supp. 42 (E.D.N.Y. 1989). The United States Court of Appeals for the Second Circuit reversed and remanded, A1-13, 901 F.2d 1148 (1990), finding that there was no Congressional intent in ADEA cases to accord preclusive effect in federal court to findings of no discrimination by state agencies which have not been judicially reviewed. A6.

SUMMARY OF ARGUMENT

This Court has, in two recent definitive decisions, reaffirmed the strong judicial policy in favor of according preclusive effect to decisions of state administrative agencies, whether or not these administrative determinations have been reviewed by state courts. These decisions are applicable in this case because neither the statutory language of ADEA, nor its legislative history, convincingly evidences a "clear and manifest" legislative intent to depart from the policy disfavoring *de novo* review.

The common law rule favoring preclusion and disfavoring *de novo* review is based on strong and principled policies of finality, consistency, judicial economy and fundamental fairness to all litigants.

If this Court affirms the decision of the Court of Appeals for the Second Circuit, it will sanction giving grievant a *post facto* choice of forum, based on the grievant's failure to persuade a state administrative agency with expertise of the viability or validity of grievant's charge. Such a decision will render virtually irrelevant the determination of the state administrative agency, that agency which has the expertise in the area of employment discrimination. This gives the claimant a second chance to try all the issues again. It subjects the employer and the dispute resolution process to duplicative costs and burdens.

Provided due process is accorded, preclusive effect should be given to the decision of an appropriate state administrative agency just as this Court held in *Kremer* that preclusive effect should be given to the decision of a state court. In many respects it should be given *a fortiori* because the state agency was established to deal with employment discrimination cases only whereas federal district courts hear many types of cases, only one of which concerns employment discrimination.

ARGUMENT

THE DETERMINATION OF A STATE AGENCY WITH EXPERTISE AND WITH JURISDICTION TO HEAR AND DECIDE SHOULD BE GIVEN PRECLUSIVE EFFECT EVEN IF NOT JUDICIALLY REVIEWED

Since 1790, all federal courts have been required to give such preclusive effect to state court judgments as they have under state law. That principle, essentially unchanged, is currently codified in 28 U.S.C. §1738. Federal courts have consistently applied res judicata and collateral estoppel to issues decided by state courts. These corollary principles of res judicata and collateral estoppel relieve parties of costly and vexatious multiple lawsuits, conserve judicial resources and prevent inconsistent decisions. *Allen v. McCurry*, 449 U.S. 90 (1980); *see Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 466 n6 (1982) ("*Kremer*").

Historically, federal courts have also given res judicata effect to state agency decisions that have been reviewed by state courts.

While *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) ("*Elliott*") held that 28 U.S.C. §1738 is not applicable to unreviewed state administrative factfinding, the Court recognized that federal courts frequently give preclusive effect to unreviewed state agency decisions provided that the agency proceedings satisfy due process requirements. *See also Kirkland v. City of Peekskill*, 828 F.2d 104 (2d Cir. 1987).

In *Elliott*, the Court pointedly noted that because 28 U.S.C. §1738 antedates the development of administrative agencies, "it does not represent a congressional determination that decisions of state administrative agencies should not be given preclusive effect." *Elliott* at 795. The *Elliott* Court went on to note that "...Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to the general rules of preclusion." (*Elliott* at 796-97; emphasis supplied).

The exception to the general rule that calls for applying the doctrine of preclusion occurs when Congress "'clearly manifests its intent" to depart from that doctrine. *Kremer* at 477. Indeed, in *Elliott* this Court has specifically recognized that "it is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity." *Elliott* at 797.

Moreover, as stated in the Restatement (Second) of Judgments §83, p. 269 (1982), cited with approval by this Court in *Elliott*, 798 n6:

> Where an administrative forum has the essential procedural characteristics of a court, ... its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

The tortuous and tortured reasoning of the Second Circuit in this case itself amply demonstrates that there was no "clearly manifest" intent of Congress to depart from the general rule of preclusion when it enacted ADEA. The *Elliott* Court's exegesis of Title VII, relying heavily on the fact that it would be inconsistent to require the EEOC in such cases only to give "substantial weight" to state agency findings and orders, but to require federal courts to give state agency decisions preclusive effect in Title VII actions, *Elliott* at 795, is inapposite here because there is no comparable language in the ADEA. The principal basis for this Court's decision in *Elliott* denying unreviewed state agency decisions preclusive effect in Title VII claims does not apply to ADEA claims. There is no general policy favoring federal court participation in discrimination cases. *See Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988); *Yellow Freight Systems v. Donnelly*,

___ U.S. ___, 100 S.Ct. 1566, 1570 (1990).

Moreover, the *Elliott* court gave preclusive effect to a state agency determination of a section 1983 claim, reemphasizing that res judicata enforces repose, discourages repetitive litigation and forum shopping and promotes federalism and consistency in judicial decision-making. *Elliott* at 798-99. This further supports the position of *amicus* that the principle of preclusion should prevail except where Congress has manifested a clear intent to the contrary.

The teaching of *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) that giving preclusive effect to administrative fact-finding is consistent with the underlying principles of collateral estoppel and res judicata, *viz.* judicial "repose", was reaffirmed in *Kremer*, 456 U.S. at 484-485, n 26, and *Elliott*, 478 U.S. at 798, and is equally forceful whether the agency involved was a creature of federal or state law. As noted in *Elliott*, "Having federal courts give preclusive effect to factfinding of state administrative tribunals also serves the value of federalism." 478 U.S. at 798.

The judicial system's need to conserve its resources is even more apparent, as federal district court dockets grow apace.

Therefore, res judicata or preclusion should apply equally to judicial determinations and administrative agency determinations

and this Court has indicated its approval of this view. Title VII race discrimination claims seem to be the only exception to the preclusion rule. That makes sense, for res judicata or preclusion has been and continues to be a cornerstone of our jurisprudence.

A heavy burden of persuasion must be borne by the party who argues that res judicata or preclusion effect should not be given to a particular state agency determination. That approach is consistent with this Court's teaching in *Kremer* and *Elliott*. It is also consistent with the Eighth Circuit's approach in *Stillians*. There, the court based its analysis on a presumption in favor of common law principles of preclusion in deciding that a state agency determination did have preclusive effect in an ADEA case whereas the Seventh Circuit in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) began with a presumption favoring repeal of res judicata in unreviewed administrative decisions in ADEA cases. The District Court in this case approached the issue in the same manner as the Eighth Circuit whereas the Second Circuit followed the Seventh Circuit. [3]

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[3]. *Also see, Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) in which the Ninth Circuit applied the principle of preclusion to an ADEA claim and *Garner v. Unicare Health Facilities, Inc.*, 651 F.Supp. 422 (E.D.Wis. 1987) where the district court also gave preclusive effect to a state agency determination in an ADEA case.

The Second Circuit sought to equate Title VII with the ADEA and conclude there is no preclusive effect in ADEA cases because this Court said there is none in Title VII cases. But they missed the point, namely that there must be specific statutory language or legislative history ("clearly manifests") that requires a court to conclude no preclusive effect for an unreviewed state agency decision.[4]

As this Court stated in *United States v. Utah Construction & Mining Co.*:

> When a state agency acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts. 384 U.S. at 422.

Preclusive effect should be given here. There was no affirmative showing that Congress intended to vitiate the preclusive

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[4]. There is no specific statutory language or legislative history to overcome the general rule of preclusion. Indeed, as the Fourth Circuit stated in *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), cert. granted ___ U.S. ___:

> In fact, Congress' grant of concurrent jurisdiction over ADEA suits may evince an affirmative intent ... to permit waiver of the judicial forum. 895 F.2d at 200.

There, the employee's claims were disposed of by arbitration. The Fourth Circuit held this was proper so long as the employee received due process and his claims received a fair hearing. They did in *Gilmer* and they did in *Astoria*.

effect of state administrative agencies fact-finding in ADEA cases.

Moreover, respondent Angelo Solimino was given a fair hearing and due process before the New York State Department of Human Rights ("DHR").[5] The hearing was attended by both parties and their counsel. Witnesses were called by both parties. They were sworn and a transcript of their testimony was taken. Oral argument was heard. The DHR dismissed the complaint of Solimino, finding that no probable cause existed to believe that the alleged age discrimination had occurred.[6] The State Human Rights Appeal Board affirmed the decision of the DHR, after giving Solimino the opportunity to submit a brief and to present oral argument.

Solimino had the right and the opportunity to seek judicial review in state court of the state agency determination, but chose not to appeal the decision of the DHR, as affirmed by the State

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[5]. This agency is charged with the responsibility of investigating employee discrimination claims and deciding those claims after hearings. The expertise of the DHR is in the field of employee discrimination, including age discrimination. The DHR investigates and hears hundreds of cases each year just like or similar to Solimino's case. The courts of New York would give the DHR fact-finding determination preclusive effect. See *Astoria*, 715 F.Supp. 42 at 51 and cases cited thereat. A 28-29; *Kirkland, supra* at 107-109.

[6]. The standard of a fair hearing articulated by this Court in *Kremer* - "...a full investigation, wherein the complainant has full opportunity to present his evidence, under oath if he so requests" (at 485) - was clearly met here.

Human Rights Appeal Board, to the appropriate state court[7]. If he had appealed and the Appellate Division had affirmed, DHR's dismissal of Solimino's claim would have been res judicata and precluded under this Court's ruling in *Kremer*.

Solimino's claim would have also been precluded by the Second Circuit in accordance with that court's decision in *Kirkland v. City of Peekskill, supra*. There, plaintiff's Title VII race discrimination claims were dismissed by the federal district court on res judicata grounds because the New York State Division of Human Rights had dismissed Mr. Kirkland's complaint and that dismissal had been upheld by the New York courts. In affirming the Second Circuit cited *Kremer* and *Elliott*. However, in this case, the Second Circuit failed to uphold the principle of preclusion in a discrimination case where the plaintiff opted not to appeal the adverse state agency ruling to the state courts. The principle of preclusion should not turn on whether the complainant opted to exhaust his state remedies by appealing an adverse agency decision to the state courts. As this Court observed in *Elliott*, 798, n6, an agency determination "should be accorded the same finality that is accorded the judgment of a court." Solimino's failure to appeal to the New York State Supreme Court Appellate Division rendered

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[7]. Under the law in effect then, judicial review was available in the Appellate Division of the New York State Supreme Court.

the DHR determination final under state law. *See*, N.Y. Executive Law § 298 (McKinney 1982 & Supp. 1990); *Astoria* 715 F.Supp. 42, 51.

Should Solimino in effect be rewarded and allowed a second opportunity to litigate his claim because he elected not to appeal? Clearly, the answer to this question should be no. As the Eighth Circuit correctly pointed out in *Stillians*:

> "Were we to allow such a choice [appeal to state court or start a new suit in federal court] the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation." 843 F.2d 276, 282.

If the Second Circuit decision stands, plaintiff and other employees will be in a no lose situation or, at the very least, the cards will be stacked heavily against the employer. If the employee wins before the state agency, that result will most likely end the matter, for the employer will be inclined to settle with the employee rather than incur further litigation costs where the agency's findings of fact will be upheld in the vast majority of cases. On the other hand, if the employee loses before the state agency, he can then file a claim in court and try his case all over again. He gets a second bite at the apple which tips the playing field in favor of the employee. Moreover, because of the costs and burden of litigation, the employer, faced with a second litigation,

may settle to avoid such costs even though he prevailed before the state agency.

Under federal common law principles, affirmed by this Court, the decision of the DHR should be given preclusive effect because: 1)there is no affirmative showing that Congress intended to vitiate the principle, 2) Mr. Solimino received a fair hearing and therefore had his day in court, and 3) an end should be put to costly and duplicative litigation.

CONCLUSION

The decision of the DHR that Solimino did not establish probable cause for his ADEA claim, as affirmed by the appeal board, should be given preclusive effect by this Court, for Solimino was accorded a full and fair hearing and he should not be given the opportunity to try his case again in another forum. The decision of the Court of Appeals should be reversed.

Dated: February 21, 1991

Respectfully submitted,

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(6)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

v.

ANGELO J. SOLIMINO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

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OCTOBER TERM, 1990

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ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

v.

ANGELO J. SOLIMINO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief amicus curiae on behalf of Astoria Federal Savings and Loan Association, seeking reversal of the decision below. The parties' written consents to file this brief have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 230 major U.S. corpora-

tions, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members, and the constituents of its association members, are subject to federal and state equal employment laws, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (1985). Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant case, i.e., whether a judicially unreviewed state agency finding of no probable cause should be given preclusive effect, so as to bar a subsequent action in federal court under the Age Discrimination in Employment Act of 1967.

Because of its interest in the res judicata effect of prior state court and administrative decisions, EEAC filed amicus briefs in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *E.g.*, *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S.

324 (1977), and *I.U.E. Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

STATEMENT OF THE CASE

On March 5, 1982, plaintiff Angelo J. Solimino was terminated from his position as Vice President of the Mortgage Origination Department at Astoria Federal Savings and Loan Association. At the time of the termination, Solimino was 63 years old. Pet. App. A3.

On March 18, 1982, Solimino filed a formal charge of age discrimination with the federal Equal Employment Opportunity Commission (EEOC). The EEOC referred the case to the New York State Division of Human Rights ("DHR") pursuant to a work-sharing agreement.[1] Treating the case as a potential violation of both the ADEA and the New York State Human Rights Law, which also prohibits discrimination in employment, the DHR assigned the case to a Human Rights Specialist for thorough investigation. *Id.* Sixty days after the commencement of state age discrimination proceedings, Solimino elected to remain in

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[1] The EEOC Compliance Manual (CCH), § 5.2 provides in pertinent part: "EEOC awards annual contracts to process Title VII and ADEA charges to FEPAs that are designated as 706 agencies . . . and, under funding principles approved by the Commission, meet certain standards of capability, performance and compatibility with EEOC's charges investigation systems and methods."

The EEOC's conditions for deferring to state agencies include: a history of accepted findings by the EEOC, 29 C.F.R. § 1601.75(b)(1), (3); EEOC evaluation of the state agency's work product, *id.* § 1601.75(b)(2); reevaluation of the state agency's work product at least once every three years, *id.* § 1601.78(a); and reevaluation at any time on the EEOC's own motion, *id.* § 1601.78(c).

the state system, although at that time he had the right to withdraw from state proceedings and file an action in federal court. Throughout the state agency proceedings, Solimino was represented by counsel.

The DHR Human Rights Specialist issued an investigative report on October 5, 1982, in which the Specialist summarized the parties' arguments and submitted evidence, and on November 29, 1982, conducted a due process hearing. *Id.*

The hearing was attended by both parties. Each was represented by counsel. Each allegation in Solimino's charge was litigated at the hearing. Each party presented witnesses who gave sworn testimony, and both parties and their attorneys had the opportunity to examine and cross-examine witnesses and present all their arguments. *Id.* A full transcript of the proceedings was produced.

On January 25, 1983, the DHR dismissed the complaint, finding that no probable cause existed to believe that the alleged discrimination had occurred. *Id.* Solimino appealed the DHR's determination of no probable cause to the New York State Human Rights Appeal Board. After giving Solimino the opportunity to submit a brief and to present oral argument, the State Human Rights Appeal Board affirmed the DHR's determination on May 30, 1984. Solimino chose not to seek judicial review in the Appellate Division of the Supreme Court of New York. Pet. App. A4.

During the pendency of his appeal before the Human Rights Appeal Board, Solimino commenced an action on July 29, 1983, in New York State Supreme Court, New York County, against certain Astoria and DHR employees and Astoria's law firm for wrongful

termination, prima facie tort, perjury and conspiracy. The action did not explicitly seek judicial review of the DHR's finding dismissing Solimino's age discrimination claim. The Supreme Court dismissed the complaint against some defendants on April 16, 1984, and as to the remaining defendants on May 10, 1984. The Appellate Division affirmed those dismissals. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dep't. 1985). Pet. App. A4.

On February 21, 1985, Solimino commenced this action against Astoria Federal in the United States District Court for the Eastern District of New York, alleging that, because of his age, Astoria denied him promotions and raises and terminated his employment. *Id.*

On February 23, 1989, Astoria moved for summary judgment on grounds that the suit was barred by the statute of limitations and that the DHR's prior judicially unreviewed finding that Solimino's treatment and termination were not due to age discrimination precluded Solimino's federal suit under the Age Discrimination in Employment Act of 1967 ("ADEA"). *Id.*

The district court granted Astoria Federal's motion for summary judgment on the administrative estoppel ground, while denying it on the statute of limitations ground. Pet. App. A18-A19.

The district court, having found nothing in the language or history of the ADEA that evinced a congressional intent to contravene the common-law rule of preclusion, adhered to the presumption that a judicially unreviewed state agency finding had preclusive effect in a subsequent ADEA action in federal court. Pet. App. A27-A28. The district court also

rejected Solimino's argument that the DHR hearing failed to meet the requirements of constitutional due process, holding that the agency obviously was acting in a judicial capacity and the parties, each represented by counsel, had an adequate opportunity to litigate the factual disputes. Pet. App. A28. Lastly, the District Court held that the DHR finding bound the Court. Pet. App. A29.

The United States Court of Appeals for the Second Circuit reversed, holding that the judicially unreviewed state agency finding of no discrimination should have no preclusive effect in a federal court action under the Age Discrimination in Employment Act of 1967, and remanded the case for further proceedings. Pet. App. A6, A13.

SUMMARY OF ARGUMENT

Application of the reasoning of this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), to the Age Discrimination in Employment Act compels the conclusion that the New York State DHR's findings rejecting the plaintiff's age discrimination claims precluded his federal suit under the ADEA.

In *Elliott*, this Court recognized that it is "sound policy" to give state administrative agency findings preclusive effect in federal court proceedings where, as here, the state agency that made those findings acted in a judicial capacity and afforded the parties a full and fair hearing. *Id.* at 797-798, *citing United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), *and Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 484-85 n. 26 (1982). Accordingly, while it also noted in *Elliott* that Congress may

decide in enacting a particular statute that "other values outweigh the policy of according finality to state administrative factfinding," 478 U.S. at 799 n. 7, this Court declined to "create an exception to the general rules of preclusion" in the absence of some clear expression of congressional intent to do so. *Id.* at 798.

In holding in *Elliott* that unreviewed state agency findings did not have preclusive effect on claims under Title VII, this Court relied on a specific provision of Title VII—Section 2000e-5(b)—that has no counterpart in the ADEA. That section requires the federal Equal Employment Opportunity Commission to give "substantial weight" to state administrative decisions, and this Court reasoned that it would have made "little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." 478 U.S. at 795.

Since the ADEA contains no provision similar to the "substantial weight" provision of Title VII, however, the only portion of the *Elliott* decision that is directly relevant to this case is the part that spells out the reasons for the Court's separate holding that unreviewed state agency findings do have preclusive effect with respect to claims under 42 U.S.C. § 1983. That part of the Court's opinion makes clear that "general rules of preclusion" are to be applied unless there is express language in a statute or its legislative history that " 'in [a] clear way suggest[s] that Congress intended to repeal or restrict the traditional doctrines of preclusion.' " *Id.* at 797, *quoting Allen v. McCurry*, 449 U.S. 90, 97-98 (1988).

The absence of any counterpart in the ADEA to the "substantial weight" provision of Title VII goes

far toward establishing that Congress did not intend to bar preclusion of ADEA claims. *Stillians v. State of Iowa*, 843 F.2d 276, 281 (8th Cir. 1988). For "[w]hen the only statutory language upon which the Court focused [in *Elliott*] is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar." *Id.* at 281-82. But what is ultimately most telling is that, like Section 1983, the ADEA contains no affirmative indication whatsoever in its language or history that Congress intended to create an exception to general rules of preclusion. *Id.*

Moreover, as this case illustrates, no such exception is necessary to effect the ADEA's general aims and purposes. The plaintiff here made a deliberate tactical decision to pursue his age discrimination claims through the state administrative system until the state appeal board affirmed the DHR's rejection of his claims. He then chose not to seek judicial review of the agency's determination. As the Eighth Circuit recognized in *Stillians*, it would be "ludicrous" to give a plaintiff in such circumstances the additional choice of "filing suit anew in the federal district court," for to allow such a choice would reduce the state administrative proceeding to "nothing more than an opportunity for the [plaintiff] to test his case and practice his presentation." 843 F.2d at 282.

Because the plaintiff had a full and fair hearing and a chance to appeal, his situation can hardly be viewed as a predicament. But even if it could, it is one "of his own making." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). In the absence of a clear statutory mandate, this Court should not create for his benefit a new exception to the general rules of preclusion. Those rules serve "vital

public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Id.* "Public policy dictates that there be an end to litigation [and] that those who have contested an issue shall be bound by the results of the contest. . . ." *Id.* Thus, this Court has said repeatedly that "[t]here is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle' " of preclusion. *Id.*, *quoting Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). For the "mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." *Id.* at 402, *quoting Reed v. Allen*, 286 U.S. 191, 198-99 (1932).

ARGUMENT

I. ABSENT AN AFFIRMATIVE SHOWING OF CONGRESSIONAL INTENT TO CREATE AN EXCEPTION TO THE COMMON-LAW RULE OF PRECLUSION, JUDICIALLY UNREVIEWED STATE AGENCY DETERMINATIONS ARE ENTITLED TO PRECLUSIVE EFFECT WHERE THE STATE AGENCY ACTED IN A JUDICIAL CAPACITY AND AFFORDED THE PARTIES A FULL AND FAIR HEARING.

Recognizing that it is "sound policy" to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity, this Court has consistently applied federal common-law rules of preclusion in the absence of a governing statute unless Congress has expressly directed otherwise. *University of Tennessee v. Elliott*, 478 U.S. 788, 794-98 (1986).

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 (1982), this Court stated:

> In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress.

Moreover, the Court noted, *id.* at n. 26, that this "usual rule" applies with full force to unreviewed findings of a state administrative agency where, as here, the agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966).

In determining whether Congress intended to depart from these common-law principles, the Eighth Circuit in *Stillians v. State of Iowa*, 843 F.2d 276, 280-81 (8th Cir. 1988) (emphasis added), explained:

> When interpreting a statute we should not forget what existed before it was enacted. 'The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes the intent specific.' *Midlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection*, 474 U.S. 494, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, '[s]tatutes which invade the common-law . . . are to be read with a *presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.*' *Isbrandsten v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952).

Indeed, this Court, ever since *Shaw v. North Pennsylvania R. Co.*, 101 U.S. 557 (1879), has recognized that statutes in derogation of the common law must be strictly construed.

The common-law principles of preclusion were firmly entrenched when the ADEA was enacted in 1967. Therefore, in construing the ADEA, a proper analysis begins with a presumption favoring the retention of those principles. Then, absent an "affirmative showing" of a "clear and manifest legislative purpose" to the contrary in the ADEA, *cf. Kremer*, 456 U.S. at 485, the common-law rule of preclusion applies.

II. THE DISTRICT COURT PROPERLY AFFORDED PRECLUSIVE EFFECT TO A JUDICIALLY UNREVIEWED STATE AGENCY DETERMINATION IN A SUBSEQUENT ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

A. The Reasoning of This Court's Decision in *University of Tennessee v. Elliott* Supports Application of the Usual Rules of Preclusion Under the ADEA.

This Court, in *University of Tennessee v. Elliott*, established a two-step approach for determining the common-law preclusive effect of judicially unreviewed state agency findings in federal court. First, the reviewing court must determine whether Congress, through the language and legislative history of the statute under which the federal claim is brought, expressed a clear intention to bar preclusive effect of the state administrative finding in federal court. *See* 478 U.S. at 797.

If Congress did not express an intent to bar preclusion, then the second step is for the court to determine whether the state administrative agency that

made the findings was acting in a judicial capacity, in a proceeding in which the litigants had an adequate opportunity to argue their claims. If so, the agency's findings are entitled to preclusive effect in federal court. *Id.* at 797-98. The resulting presumption favoring preclusive effect stems from res judicata principles of "enforcing repose". *Id.* at 798.

In *Elliott*, this Court held, with respect to Title VII cases, that Congress did not intend to give preclusive effect to judicially unreviewed findings of a state agency. Yet, with respect to Section 1983 cases, this Court reached the opposite conclusion. These differing holdings under two, substantively-overlapping federal employment discrimination statutes reflect the critical importance of a clear manifestation of congressional intent to "create an exception to general rules of preclusion." *Id.* at 797.

In examining Title VII, the Court found such a manifestation of intent in Section 2000e-5(b), which requires the federal EEOC to give "substantial weight" to state administrative decisions. That provision, the Court reasoned, would have made "little sense" if state agency findings were entitled to preclusive effect when a Title VII claim went on to a federal court. *Id.* at 795. In contrast, the Court found nothing in the language or legislative history of § 1983 which "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion. . . ." *Id.* at 797 (quoting *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980)).

In the instant case, then the paramount question is whether the ADEA, through its unique language and legislative history, manifests clear congressional intent to create an exception to the usual rule favoring retention of the common-law rule of preclusion. As

discussed below, nothing in the ADEA's language or enactment history remotely expresses any such congressional intent. Therefore, since there is no dispute that the other conditions for preclusion were met in this case—the plaintiff had a full opportunity to litigate his claims before an agency acting in a judicial capacity—the district court was correct in holding that the plaintiff's federal action was barred.

B. Congress Expressed No Intention in the Language or Legislative History of the ADEA to Bar Preclusion of Judicially Unreviewed State Agency Determinations.

The district court below, like the Eighth Circuit in *Stillians*, *supra*, properly applied the principles established by this Court in *Elliott*. As we show below, both the district court and the Eighth Circuit looked to the language and legislative history of the ADEA to determine whether Congress clearly intended to override the presumption favoring retention of the common-law rule of preclusion.[2]

1. *A Comparison of the ADEA and Title VII Yields Clear Evidence of Congressional Intent to Allow Preclusion of ADEA.*

As noted above, in declining to apply the usual common-law rules of preclusion with respect to Title VII claims, this Court in *Elliott* relied heavily on

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[2] In contrast, the Second Circuit below and the Seventh Circuit in *Duggan v. Board of Educ. of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987), did not properly apply this Court's analysis in *Elliott*. Both of those courts failed to address the critical issue of whether Congress, through the language and legislative history unique to the ADEA, intended the ADEA to subrogate traditional rules of preclusion.

Section 2000e-5(b) of Title VII, which requires the EEOC to give substantial weight to state administrative decisions—a requirement which, the Court reasoned, would make no sense if such decisions had preclusive effect. 478 U.S. at 794. By contrast, this Court in *Elliott* found nothing in the language of Section 1983, like the "substantial weight" provision of Title VII, that manifested congressional intent to contravene common-law principles of preclusion. *Id.* at 798.

In applying the reasoning of *Elliott* to the ADEA, the Eighth Circuit correctly observed that the absence from the ADEA of a provision similar to Section 2000e-5(b) of Title VII "goes far toward resolving the issue before us." 843 F.2d at 281. This striking difference between Title VII and the ADEA strongly suggests congressional intent to distinguish the statutes, particularly because Title VII was already in effect and, in certain other respects, was used as a model when Congress enacted the ADEA. "When the only statutory language upon which the Court [in *Elliott*] focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the [ADEA and Title VII] may be similar." *Id.* at 281-82.

2. *The Language of the ADEA, by Its Plain Meaning, Does Not Rebut the Presumption Favoring Retention of the Common-Law Rule of Preclusion.*

"The meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. U.S.*, 242 U.S. 470 (1917). No provision in the ADEA, by its "plain meaning," bars the

application of the common-law rule of preclusion. If Congress had intended to bar preclusive effect of state agency determinations, it could easily have drafted a provision which stated as much. "If the result intended by Congress seems inconsistent with the overall objectives of the statutes, so be it. Only Congress legislates and only Congress can amend." *Stillians*, 843 F.2d at 280.

In fact, however, there is no inconsistency between the objectives of the ADEA and the principles of preclusion. The ADEA recognizes jurisdiction over age claims concurrently with state courts, giving the plaintiff the option of pursuing a federal claim if he elects to do so. Thus, in no way can it be said that precluding a later federal claim in any way forecloses an ADEA claimant from having his claim heard in federal court.

This Court in *Oscar Mayer* interpreted § 14(b) of the ADEA,[3] which defines the state-federal relationship in processing age discrimination claims, as requiring petitioners to file with appropriate state agencies, concluding:

> The ADEA permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing of age-discrimination claims. . . . There is no reason to conclude, therefore, that the possibility of

[3] 29 U.S.C. § 633(b) provides, in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

> concurrent state and federal cognizance supports the construction of § 14(b) that ADEA grievants may ignore state remedies altogether.

Oscar Mayer, 441 U.S. 750, 756 (1979).[4]

Moreover, the deferral mechanism of § 14(b) addresses the state authority's exclusive jurisdiction for sixty days to process complaints. This provision does not address preclusion directly. A deferral mechanism, however, does not indicate congressional intent to contravene the common-law rule of preclusion. This Court held in *Kremer v. Chemical Construction Corp.* with respect to Title VII's deferral provision:

> It is even more implausible to find an implied repeal [of 28 U.S.C. § 1738] in the limited deferral to pending state and local proceedings, § 706(c), 42 U.S.C. § 2000e-5(c). First, that provision does not even address the issue of the proper weight to be afforded state decisions. Moreover, . . . it is doubtful that Congress even contemplated that the provision applied after a complaint had run the full course of state administrative and judicial consideration.

456 U.S. 461, 471, n.8 (1982).

In addition, the § 14(b) deferral provision is consistent with the common-law rule of preclusion. The Eighth Circuit in *Stillians* provides the following example:

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[4] *Oscar Mayer* also stated: "[u]nless § 14(b) is to be stripped of all meaning, state agencies must be given at least some opportunity to solve problems of discrimination. While 60 days provides a limited time for the state agency to act, that was a decision for Congress to make and Congress apparently thought it sufficient." 441 U.S. at 757.

For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, *it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738, or filing suit anew in the federal district court.* Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation. *Cf. Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478, 102 S.Ct. 1883, 1895, 72 L.Ed.2d 262 (1982) (giving finality to state court judgments increases parties' incentive to pursue review in state courts).

843 F.2d at 282 (emphasis added).

3. *The Legislative History of the ADEA Does Not Overcome the Presumption Favoring Preclusion.*

Like the ADEA's language, the ADEA's legislative history is devoid of any clear indication of congressional intent to override the common-law rule of preclusion. Indeed, the legislative history is silent with respect to preclusion. Thus, applying the *Elliott* test, normal principles of preclusion must apply.

This Court in *Ex Parte Collett*, 337 U.S. 55 (1949), emphasized that

> [t]he plain words and meaning of a statute cannot be overcome by a legislative history, which

> through *strained processes of deduction* from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Gemsco v. Walling*, 1945, 324 U.S. 244, 260, 65 S.Ct. 605, 614, 89 L.Ed.921. This cannon of construction has received consistent adherence in our decisions.

Id. at 61 (emphasis added).

Moreover, the Eighth Circuit stated:

> Ascertaining congressional intent is often a difficult endeavor. When a statute does not speak on an issue and the legislative history is silent, we are forced to decide between two conflicting results. Our decision should not be based on our opinion on what direction the statute should take. If the result intended by Congress seems inconsistent with the overall objectives of the statute, so be it. Only Congress legislates and only Congress can amend.

Stillians, 843 F.2d at 280 (emphasis added). Indeed, the Seventh Circuit in *Duggan* even acknowledged that the ADEA's legislative history does not help us decide which policies actually lie behind section § 633(b). 818 F.2d at 1296.

The Second Circuit below concluded that Congress enacted the ADEA in part because some state age discrimination laws were ineffective or inadequately enforced. 901 F.2d at 1151. However, this Court in *Kremer* recognized that "*New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination.*" 456 U.S. at 473 (emphasis added).[5]

The Fourth and Ninth circuits have suggested that, in amending the ADEA, Congress found it unnecessary to reconsider issues previously resolved in Title VII debates. Under this analysis, the absence of ADEA legislative history does not necessarily refute congressional intent that ADEA and Title VII have comparable preclusive effect.[6]

There is, however, a serious flaw in this reasoning that an absence of debate proves congressional intent. First, it ignores the fact that the language of the two statutes differ, making it implausible that silence in the latter instance reflects a similar conclusion. Second, serious problems of reliability and relevance are raised by such an inference. Indeed, such an interpretation would be the result of "strained processes of deduction" that are clearly prohibited by this Court's decision in *Ex Parte Collett.* 337 U.S. at 61.

Often statutes are the result of strategy and tactics. Debate may be kept to a minimum in order to

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[5] This Court in *Kremer*, 456 U.S. at 473, n.13, relied on the following legislative history: 110 Cong. Rec. 1635-1636 (1964), reprinted in 1964 Leg. Hist. 3345-3346 (remarks of Cong. Reid) ("The New York State Commission for Human Rights has pioneered effectively and it has now been copied in 22 States . . ."); 110 Cong. Rec. 1643 (1964), 1964 Leg. Hist. 3258-3259 (remarks of Cong. Ryan); 110 Cong. Rec. 12595 (1964), 1964 Leg. Hist. 3066 (remarks of Sen. Clark).

[6] See *Rosenfeld v. Department of the Army*, 769 F.2d 237, 240 (4th Cir. 1985) (holding Title VII's bar of administrative preclusion applies to ADEA); *Nabors v. United States*, 568 F.2d 657, 660 (9th Cir. 1978) (ADEA entitles federal employees to trial de novo).

achieve consensus and advance the bill. Moreover, pertinent discussion may simply be unrecorded or inadequately preserved, making reconstruction of what actually transpired in hopes of deciphering congressional intent impossible. When Congress leaves little material from which to gather its intent, mere speculation is improper.

III. PUBLIC POLICY IS NOT SERVED BY ESTABLISHING A PRECEDENT FOR DISREGARDING ORDINARY RULES OF PRECLUSION IN THE ABSENCE OF A CLEAR CONGRESSIONAL MANDATE TO DO SO.

A. Giving Preclusive Effect to the Factfinding of a State Administrative Tribunal Serves the Values of Avoiding the Cost and Vexation of Multiple Litigation, Judicial Economy and Federalism.

This Court in *Elliott* recognized that "it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity." 478 U.S. at 798. The Court stressed:

> [G]iving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose. This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, *Allen v. McCurry*, 449 U.S. at 94, 101 S.Ct., at 414, is equally implicated *whether factfinding is done by a federal or state agency.*

478 U.S. at 798 (emphasis added). Furthermore, the Court stated that "having federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism. *Id.* "There is no overriding federal policy that dis-

crimination claims be heard in federal court." *Stillians*, 843 F.2d at 282.

Since the plaintiff in this case had the opportunity to forego state remedies in favor of a federal lawsuit, it is not unfair to require him to live with his decision. *Id.* To hold otherwise would reduce the state administrative proceedings and determination to "nothing more than an opportunity for the [plaintiff] to test his case and practice his presentation." *Id.*

B. No Principle of Law or Equity Sanctions the Rejection by a Federal Court of the Principles of Res Judicata and Preclusion.

This Court in *Federated Dept. Stores* v. *Moitie*, 452 U.S. 394, 401 (1981), reasoned:

> [W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. *'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied.* The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutory principles of res judicata.' *Heiser v. Woodruff*, 327 U.S. 726, 773, 66 S.Ct. 853, 856, 90 L.Ed. 970 (1946) . . . This court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931).

Furthermore, the Court urged:

> We have stressed that '[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. *It is a rule of fundamental and substantial justice*, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . .' *Hart Steel Co. v Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917). The language used by this Court half a century ago is even more compelling *in light of today's crowded dockets:*
>
> > 'The predicament in which respondent finds himself is of his own making. . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy.'

Id. at 401-02 (emphasis added).

Public policy would not be served by setting a precedent for disregarding the fundamental and long-standing rules of preclusion. In the instant case, the plaintiff made a tactical decision to remain in state administrative proceedings and forego judicial review of the state agency determination. He has had an adequate opportunity to litigate age discrimination issues, and he should be required to live with that decision.

The situation in which the plaintiff finds himself can scarcely be described as a "predicament." He has had a full and fair hearing and an opportunity

to appeal. But it is a situation "of his own making." In these circumstances, "the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.' *Reed v. Allen*, 286 U.S., at 198-199, 52 S.Ct., at 533." *Id.* at 402. Another opportunity to litigate the same age discrimination issues is not required by the ADEA and should not be created by this Court.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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QUESTION PRESENTED

Whether a judicially unreviewed determination of a state administrative agency precludes an action in federal court under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1895

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

v.

ANGELO J. SOLIMINO,
Respondent.

On Writ of Certiorari from the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-three million persons age fifty and older. Approximately eleven million AARP members are employed, most of whom are protected by the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*

AARP represents the interests of older persons through legislative, judicial and administrative advocacy. The Worker Equity Initiative of AARP was created in 1985 to study and address issues affecting the employment of older workers, particularly age discrimination. Proper and full enforcement of the federal and state age dis-

crimination laws is of paramount importance to AARP and its members. To this end, AARP has been a strong advocate of legislation to strengthen the protections and procedures of the ADEA and state laws. In addition, AARP has filed numerous *amicus curiae* briefs in this Court and the United States Courts of Appeals concerning the interpretation of the ADEA to insure that the law safeguards the interests of older workers.[1]

The most significant right and remedy Congress provided older workers in the ADEA is the right to their day in court, particularly before a jury of their peers. Whether Congress intended to close the courthouse door to older workers who first seek relief through a state administrative agency, is an issue of significant concern to AARP members and other older persons who have been victims of age discrimination. For this reason, AARP respectfully submits this brief *amicus curiae*.[2]

STATEMENT OF THE CASE

AARP adopts the statement of Respondent, Angelo Solimino.

SUMMARY OF ARGUMENT

The question before this Court is who shall be the final judge in an ADEA case—a state administrative agency or a federal court. A court should craft a common law rule of preclusion that gives a state agency the last word

[1] *See, e.g., Gregory v. Ashcroft*, No. 90-50, *cert. granted*, 111 S. Ct. 507 (1990); *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18, *cert. granted*, 111 S. Ct. 41 (1990); *Hoffman-LaRoche, Inc. v. Sperling*, 110 S. Ct. 482 (1989); *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854 (1989); *Harbison-Walker Refractories v. Brieck, cert. dismissed*, 487 U.S. 1216 (1988). AARP also filed a brief *amicus curiae* in this case before the Second Circuit. *Solimino v. Astoria Federal Savings and Loan Association*, 901 F.2d 1148 (2d Cir. 1990).

[2] The written consents of the parties to AARP's participation as *amicus curiae* have been filed with the Clerk of the Court.

in an ADEA case only if such a rule is consistent with congressional intent. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). This Court need only look to the language and legislative history of the ADEA to discern that Congress intended for the courts, not administrative agencies, to make the ultimate determination of age discrimination.

The plain language of the ADEA evidences Congress' intent to preserve the individual's right to a *de novo* court proceeding following a state administrative determination. Section 14(b) of the ADEA permits aggrieved persons to bring a civil action in court to adjudicate their claims either during or after the state administrative process. Congress specified that the civil action under the ADEA would be a jury trial. Surely, Congress would not have authorized the right to a jury trial after state proceedings had terminated if it viewed the state administrative determination as precluding a federal court action.

The language of section 14(a) of the ADEA also reflects Congress' intent that a federal court action takes precedence over state proceedings. In section 14(a), Congress mandated that the filing of a civil action under the ADEA "shall supersede any State action in Section 14(a)." 29 U.S.C. § 633(a). At a minimum, the plain meaning of "supersede" is that the court action under the ADEA ultimately sets aside or takes the place of the state action. Applying a rule of preclusion would turn section 14(a) on its head, as the state administrative proceedings would, in essence, replace the ADEA civil action.

Allowing the decisions of various state agencies to preclude federal court actions under the ADEA would lead to uneven and scattered enforcement of the federal law. It is well established that determinations by the federal enforcement agency, the Equal Employment Opportunity Commission (EEOC), do not preclude a *de novo* proceeding in court. Thus, individuals who proceed through the

EEOC retain their right to a jury trial regardless of an adverse determination by the federal agency.

If the Court creates a rule of administrative preclusion for ADEA cases, individuals who receive an adverse determination by a state agency would lose their day in court, even when they only sought to pursue their rights and claims under federal law. The right to a *de novo* proceeding in federal court would depend on which agency, federal or state, investigated the charge. The result would also differ between state agencies as a number of state laws provide for a *de novo* court proceeding, yet others do not. Such a result conflicts with Congress' vision of a national policy to eliminate age discrimination from society and to have that policy uniformly enforced through the courts.

Congress encouraged prompt administrative resolution of claims to benefit older workers, not to prevent older workers from seeking relief in the courts. Allowing state agency determinations to deprive older workers of the right to have a court hear and decide their claims conflicts with Congress' decision to give the courts the last word in remedying age discrimination.

ARGUMENT

THE ADEA MANDATES THAT THE COURTS, NOT ADMINISTRATIVE AGENCIES, ULTIMATELY DETERMINE THE FEDERAL RIGHTS THAT CONGRESS GUARANTEED OLDER WORKERS.

INTRODUCTION

The Second Circuit below held that it is inappropriate for the federal courts to fashion a common law rule that gives preclusive effect to determinations of state administrative agencies in an ADEA action in federal court, relying on *University of Tennessee v. Elliott*, 478 U.S. 788, 795-796 (1986). In *Elliott*, this Court held that a

common law rule of preclusion is inconsistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. In reaching this conclusion, the Court examined the language and legislative history of Title VII and relied on precedent that federal employees have a right to *de novo* court proceedings. *Elliott*, 478 U.S. at 795.

In *Elliott*, the Court focused on section 706(b) of Title VII, which outlines in part the relationship between state administrative agencies and the federal enforcement agency, the Equal Employment Opportunity Commission (EEOC). The Court held that since the language of section 706(b) requires the EEOC to give "substantial weight" to the determinations of state agencies, it would be inconsistent with the statute to accord preclusive effect in federal court to such findings.

In ruling against administrative preclusion, the Court also relied on its decision in *Chandler v. Roudebush*, 425 U.S. 480 (1976). *Chandler* held that a federal employee was entitled to *de novo* review in federal court on her Title VII claims even after an administrative hearing. While no specific language in the federal employee provision of Title VII, § 717, 42 U.S.C. § 2000e-16, spoke to the weight of administrative determinations, the Court found that the overall language of the statute coupled with the legislative history, "confirm[ed] that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees. . . ." *Elliott*, 478 U.S. at 795, quoting *Chandler*, 425 U.S. at 848.

Applying the Court's analysis in *Elliott* to the ADEA compels the same result—a state administrative determination does not preclude a *de novo* action in court. Sections 14(a) and (b) of the ADEA manifest Congress' intent to make the courts the ultimate adjudicators and enforcers of rights under the federal law. Congress made the ADEA civil action supersede any state action and granted individuals the right to a *de novo*

hearing in federal court following the termination of state proceedings. The decision of the Second Circuit in this case, along with decisions of the Fourth and Seventh Circuits,[3] properly conclude that the language, structure, and legislative history of the ADEA make the ruling in *Elliott* applicable to ADEA cases.

A. The Purpose of State Agency Review Is to Supplement, Not Supplant, the Judicial Remedies Available to Victims of Discrimination.

1. *Section 14(b) of the ADEA Provides for an Action in Federal Court Following the Termination of State Proceedings.*

The language of ADEA section 14(b) demonstrates that administrative preclusion is not consistent with congressional intent in designing the ADEA. ADEA section 14(b) provides that no suit may be brought under section 7 of the ADEA until "sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ." 29 U.S.C. § 633(b).[4]

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[3] *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987); *Rosenfeld v. Department of the Army*, 769 F.2d 237 (4th Cir. 1985). *See also Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646 (11th Cir. 1987) (*dicta* that unreviewed state agency findings should not be given preclusive effect).

[4] As this Court has recognized, Congress patterned ADEA section 14(b), the provision for referring charges to the states, after Title VII section 706(c), 42 U.S.C. § 2000e-5(c). *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979). In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 469 (1982), the Court viewed Title VII section 706(c), along with the substantial weight provision in Title VII section 706(b), as indicative of congressional intent to preserve a trial *de novo* following the determinations of federal or state agencies. The ADEA should be similarly construed given the parallel language and purpose between ADEA section 14(b) and Title VII section 706(c). *Oscar Mayer*, 441 U.S. at 756.

The statutory language plainly authorizes the filing of a civil action after the termination of state proceedings. By expressly permitting a civil action to be brought after state proceedings have concluded, Congress made clear its intent to preserve the right to bring suit granted by ADEA section 7 following a final state action. A common law rule of administrative preclusion would make the language in section 14(b) meaningless, since such a rule would preclude the civil action itself.[5]

Moreover, Congress expressly provided that the civil action guaranteed by section 7 is a jury trial in a court of competent jurisdiction. 29 U.S.C. § 626(c)(1), (2). This reference to section 7 makes clear that Congress intended to secure a *de novo* hearing after the state agency had concluded its proceedings.[6]

Congress used language similar to section 14(b) in another provision of the ADEA to demonstrate that the determination of the state agency is not binding on the courts or the EEOC. Section 7(d)(2) expressly provides for subsequent federal action by the EEOC following the termination of state proceedings. Congress authorized EEOC to seek elimination of the discriminatory practice even after the state had rendered its de-

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[5] Petitioner and its *amici* argue that this language in section 14(b) means the employee must be bound by the agency determination even if it occurs before the employee is first permitted to withdraw from the administrative process and file an action in court. The harshness of such a result demonstrates that petitioner's construction is wholly inconsistent with the statutory scheme.

[6] Even the business community acknowledged the fairness of *de novo* review as essential to a discrimination statute. As the representative of the Chamber of Commerce testified at the hearings on the ADEA:

> A hearing *de novo* in court is the fairer approach. Each man feels he would like to have his day in court.

Hearings Before the Senate Committee on Labor and Public Welfare, Subcomm. on Labor on S. 830 and S. 788, 90th Cong., 1st Sess. 113 (1967).

cision. This provision would be totally meaningless if the state agency's determination had preclusive effect. By specifically authorizing EEOC to remedy the discrimination regardless of the state agency's action, Congress decided that the state agency would not have the last word in determining the employee's claim or his rights.

2. *Neither the State Administrative Proceedings, nor the Federal EEOC Process Substitutes for a Full Judicial Determination.*

Allowing a state agency determination to preclude a federal court action not only conflicts with the language of section 14(b), it contravenes the purposes underlying section 14(b). When Congress enacted the ADEA, it crafted a delicate scheme in which the states' efforts would supplement, not replace, federal enforcement and federal remedies. *See Oscar Mayer*, 441 U.S. at 764-65. Given the ineffectiveness of the state laws and agencies at the time the ADEA was passed, Congress provided "formal remedial procedures to compel compliance with the law . . . through suits, either by the Secretary of Labor or the aggrieved individual, in the Federal or State courts." 113 Cong. Rec. 31254 (Remarks of Sen. Javits).

The legislative history of section 14 of the ADEA makes clear that Congress sought to create a "clear-cut and implemented Federal policy * * * [that] would provide a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age." S. Rep. No. 723, 90th Cong., 1st Sess. 2 (1967).

Congress carefully structured the relationship between federal and state enforcement of age discrimination claims in the ADEA in light of various problems with civil rights enforcement at the time the ADEA was enacted. A "national policy to stop invidious distinctions in employment because of age," 113 Cong. Rec. 31253

(1967) (Remarks of Sen. Yarborough), was needed, in part, because of the lack of uniformity[7] and the ineffectiveness[8] of the twenty-four state laws prohibiting age discrimination that existed at that time.[9] Indeed, even officials in states with age discrimination laws favored federal legislation that would establish a national policy. S. Rep. No. 723, 90th Cong., 1st Sess. 3 (1967).

Given the inadequacy of the state laws, Congress required a state to not only have a law prohibiting age discrimination like the ADEA in order to participate in ADEA enforcement, but to establish a "State authority to grant or seek relief from such discriminatory practice . . ." 29 U.S.C. § 633(b).[10] In making such a re-

[7] "Although age discrimination in employment laws are found in about one-half of our States, such laws generally are not considered to be very effective." 113 Cong. Rec. 34743 (1967) (Remarks of Rep. Matsunza). There were exceptions, but "the principal reason was the lack of uniformity." *Id.*

[8] "[M]any of the [state] laws have not been implemented and most of the states lack the resources to assure compliance." 113 Cong. Rec. 34752 (1967) (Remarks of Rep. Dwyer).

[9] *See The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, p. 10, *reprinted in* Legislative History of the Age Discrimination in Employment Act of 1967, U.S. Equal Employment Opportunity Commission, p. 27 (hereinafter "Leg. Hist.").

[10] Forty-six states plus the District of Columbia currently have laws prohibiting age discrimination against private and public employees. *See* Alaska Stat. § 18.80.220(a)(1); Cal. Gov't Code § 12941(a); Colo. Rev. Stat. § 8-2-116; Conn. Gen. Stat. § 46a-60(a)(1); Del. Code Ann. tit. 19, § 710(7); D.C. Code Ann. § 1-2502(2); Fla. Stat. § 760-01-10, 112.043-44; Ga. Code Ann. §§ 34-1-2(a), 45-19-20 to 42; Haw. Rev. Stat. § 378-2; Idaho Code § 67-5910(7); Ill. Rev. Stat. ch. 68, para. 1-103(A); Ind. Code § 22-9-2-1; Iowa Code § 601A.6(1)(2); Kan. Stat. Ann. § 44-1115; Ky. Rev. Stat. Ann. § 344.010(4); La. Rev. Stat. Ann. § 972; Me. Rev. Stat. Ann. tit. 5, § 4572; Md. Code Ann. art. 49B, § 16(a); Mass. Gen. Laws Ann. ch. 151B, § 1(8); Mich. Stat. Ann. § 3.548(202); Minn. Stat. §§ 181.81, 363.03(1), (2); Mo. Rev. Stat. 213.055(1);

quirement, Congress established minimum rights, protections, and procedures in the ADEA. While the states may provide greater rights and protections, they may not diminish the protections afforded under the federal law.

Section 14(b) grants a state agency an opportunity to promptly resolve the employment dispute. As this Court has recognized, the purpose of referring charges to the states for at least sixty days was "to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer & Co. v. Evans*, 441 U.S. at 756.

The state agency's role in enforcement of the ADEA parallels the role of the federal agency, the EEOC, to promptly conciliate and resolve charges of discrimination. When EEOC refers charges to the state agencies for investigation and resolution, the state administrative process substitutes for the federal administrative process. Indeed, EEOC's regulations defining the processing and investigation of charges make the state agencies the agents or proxies of the EEOC. *See* 29 C.F.R. § 1626.10 (c) (1990). State agencies are authorized to "act on certain charges and the Commission will promptly process charges which the State agency does not pursue." 29

Mont. Code Ann. § 49-2-303(1); Neb. Rev. Stat. § 48-1003(1); Nev. Rev. Stat. 613.330(a); N.H. Rev. Stat. Ann. § 354-A:8(I); N.J. Rev. Stat. § 10:5-2.1; N.M. Stat. Ann. § 28-1-7(A); N.Y. Exec. Law § 296(3-a)(a); N.C. Gen. Stat. §§ 126-16, 143-416.2; N.D. Cent. Code § 14-02.4-02(1); Ohio Rev. Code Ann. § 4112.02; Okla. Stat. Ann. tit. 25, § 1302.(1); Or. Rev. Stat. § 659.030(1)(a), (b); 43 Pa. Cons. Stat. § 954(h); R.I. Gen. Laws 28-5-6(J); S.C. Code Ann. § 1-13-30(c); Tenn. Code Ann. § 4-21-101; Tex. Rev. Civ. Stat. Ann. art. 5221k, § 1.04(a); Utah Code Ann. § 34-35-6(1)(a); Vt. Stat. Ann. tit. 21, § 495(c); Va. Code Ann. § 2.1-116.10; Wash. Rev. Code § 49.44.090(1); W. Va. Code § 5-11-3(q); Wis. Stat. Ann. § 111.33 (1); Wyo. Stat. § 27-9-105(b). Three states only cover public employees in their state laws. *See* Ark. Stat. Ann. § 12-3502; Miss. Code Ann. § 25-9-149; S.D. Codified Laws Ann. § 3-6A-36.1. Alabama has no age discrimination in employment law.

C.F.R. § 1626.10(c) (1990). A charge received by the state agency is deemed to have been received by the EEOC, and *vice versa*. *Id.*

It is well-established that the civil action following an EEOC investigation and determination is *de novo*. *See, e.g., Elliott*, 478 U.S at 795; *Kremer*, 456 U.S. at 469-70. Where the state agency acts as EEOC's agent for the processing of charges, the determination of the state agency should have no greater effect than the EEOC's determination would have on a court action. Moreover, given Congress' dissatisfaction with the ineffectiveness of state agencies at the time the ADEA was passed, it would be anomalous to accord greater power and preclusive effect to the determinations of state agencies.[11]

The state administrative process does not substitute for a *de novo* court action. The Court emphasized this aspect of section 14(b) in *Oscar Mayer*, reasoning that:

> Prior resort to the state remedy would not impair the availability of the federal remedy, for the two are supplementary, not mutually exclusive.

Oscar Mayer & Co. v. Evans, 441 U.S. at 764. Moreover, EEOC regulations emphasize that the referral and processing of charges by state agencies must "safeguard [ ] the federal rights of aggrieved persons." 29 C.F.R. § 1626.10(a) (1990). Since the state agency action is intended to supplement, not replace, the remedy provided by a federal court, permitting the state administrative decision to preclude a court action is not consistent with the scheme carefully crafted by Congress.

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[11] The ineffectiveness of the state agencies continues to be a concern even twenty years after passage of the ADEA. Attorneys representing businesses express great dissatisfaction with the ineffectiveness of state agencies. *See* M. Schuster, The Age Discrimination in Employment Act: An Evaluation of Federal and State Enforcement, Legal Processes and Employer Compliance 29 (School of Management Syracuse University 1989).

Applying a common law rule of preclusion to ADEA cases would make federal rights and remedies depend on the state law and agency where the employee worked and brought suit. Such a result would mean uneven and haphazard enforcement of the ADEA and would deny individuals in certain states their full rights under the ADEA.

Frequently, as in this case,[12] an individual files his charge only with the EEOC and seeks to exercise his rights only under the federal law. Even when the individual does not raise a state law claim, EEOC may refer the ADEA charge to the state agency to satisfy section 14(b) and thereby protect the individual's right to sue under the ADEA. EEOC may also have the state agency investigate and conciliate the charge on behalf of EEOC, pursuant to its worksharing agreement with the state agency. 29 C.F.R. § 1626.10(b) (1990).

The individual who files a charge with the EEOC does not control whether the state agency or the EEOC will investigate his charge. Yet petitioner's theory defines the employee's rights based on which agency, the state or federal, decides the claim. For example, petitioner argues that since under New York age discrimination law, the state court would give preclusive effect to the state agency's determination of a state law claim, the federal court should give similar effect to the state agency determination in a suit brought under the federal law.

Petitioner's theory not only denies the employee his federal rights, it leads to inconsistent results among the state laws. For instance, a number of state age discrimination laws provide for jury trials or *de novo* court

[12] Respondent filed a charge of discrimination with the EEOC only. EEOC referred the charge to the New York Department of Human Rights not only to protect Respondent's federal rights, but also for investigation and conciliation. Petitioner's Brief at 4.

proceedings,[13] which would mean the state agency determinations in those states have no preclusive effect. Obviously in states without age discrimination laws or enforcement authorities,[14] employees would be entitled to a jury trial under the ADEA, since the federal agency determination has no preclusive effect. *See Duggan*, 818 F.2d at 1295, n. 10.

The extent of the federal right and remedy under the ADEA clearly cannot depend on the procedures of the state age discrimination laws. *See, e.g., Oscar Mayer & Co.*, 441 U.S. at 763. To the contrary, Congress sought to safeguard the federal rights and remedies under the ADEA by insuring that the state laws and procedures not impair the federal right. *Id.*

Petitioner's construction of the ADEA not only minimizes the federal rights and remedies, it disregards Congress' intent to provide both an administrative and a judicial forum to victims of discrimination. Petitioner argues that individuals should be bound by the state agency determination unless they abandon the state process before a hearing and decision. Petitioner's theory compels the employee to choose between administrative resolution by the state agency and a jury trial in federal court. This argument makes administrative relief and judicial relief mutually exclusive, a premise at odds with the statutory scheme designed by Congress. Congress expressly granted employees an administrative forum and a judicial forum for redress of their rights under the ADEA. *See* 29 U.S.C. §§ 626(c), (d). Yet petitioner's

[13] *See*, Idaho Code § 67-5908 (right to a jury trial); N.J. Stat. Ann. § 10-5-13 (right to a jury trial); N.M. Stat. Ann. §§ 28-1-13(A) and (C) rights to a *de novo* review in court and to a jury trial).

[14] *See Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 647 n. 9 (11th Cir. 1987) (Georgia not a referral state since it "has not established a state authority "to grant or seek relief from such discriminatory practice.")

theory eliminates the possibility of prompt and informal conciliation without litigation, which is one of the essential responsibilities of the EEOC and the state agencies.

The individual who files a charge is unlikely to understand the purpose or effect or the worksharing arrangement between EEOC and the state agency. The victim of discrimination merely seeks an investigation of his claim and an attempt at informal conciliation or administrative resolution. The individual is typically not represented by counsel when he initiates or proceeds through the administrative process. No notice is given to him of the consequences of exercising his right to administrative relief.[15] Yet, the petitioner would impose a requirement that the individual must quickly withdraw from the administrative system or risk losing his day in court. Such a result is particularly inappropriate "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Oscar Mayer*, 441 U.S. at 761 quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

B. A Common Law Rule of Preclusion Is Inconsistent With ADEA Section 14(a), Which Provides That ADEA Actions "Supersede Any State Action."

The relationship between federal and state enforcement in the ADEA is defined by section 14(a) of the ADEA, as well as by section 14(b). Section 14(a) provides:

> Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age *except that upon commencement of action under this Act such action shall supersede any State action.*

29 U.S.C. § 633(a) (emphasis added).

[15] *See* J.A. 89-90, 92-93.

While state actions are not preempted under the ADEA,[16] the supersede language of section 14(a) makes the federal action take precedence over "any State action." The plain meaning of the supersede clause is that the federal action causes the state action to be set aside.[17] The phrase "any State action" clearly includes administrative actions, as section 14(a) specifically mentions "the jurisdiction of any agency." 29 U.S.C. § 633(a).[18] Congress did not qualify the phrase "any State action" as limited to pending or completed actions, and the phrase can reasonably be interpreted to encompass either pending or completed actions.[19]

Administrative preclusion would not only be inconsistent with the language of ADEA section 14(a), it would stand the language on its head. Giving preclusive effect to a state agency determination would, in essence, make

[16] *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 11 (Leg. Hist. 84); S. Rep. No. 723, 90th Cong., 1st Sess. 11 (Leg. Hist. 115).

[17] The plain meaning of "supersede" is to "cause to be set aside or dropped from use as inferior or obsolete and replaced by something else; to take the place of in function; to replace." Webster's New World Dictionary, Third College Edison (1988), 1344.

[18] *See, e.g., Dunlop v. Pan American World Airways Inc.*, 672 F.2d 1044 (2d Cir. 1982).

[19] Petitioner contends that the phrase only applies to pending actions and relies on a reference in the committee reports, which states that commencement of an action under the Act shall stay any state action previously commenced. H.R. Rep. No. 805, at 11; S. Rep. No. 723 at 11. Neither the language of the statute nor the legislative history state that section 14(a) shall have *only* that effect. Congress could have used language which would have limited the reach of section 14(a) to pending actions were that its sole purpose. Instead, Congress used far broader language.

For example, Congress used the word "supersede" seven years later in section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), when it wanted to indicate an intent to broadly prevent state laws from interfering with the operation of the federal pension law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

the state administrative process replace or substitute for federal court adjudication. The findings of fact of the state agency official would replace those of a federal court, a result at odds with the plain meaning of the supersede clause in section 14(a).

The legislative history of section 14(a) also supports a construction of the statute in which the ADEA civil action takes precedence over state action. As initially proposed by the Johnson Administration, the ADEA was to be enforced by administrative proceedings brought by the Secretary of Labor, similar to the enforcement machinery of the National Labor Relations Act.[20] Section 14 of the Administration bill only contained what is now the first clause in section 14(a) and did not include the supersede clause or what is now section 14(b). With enforcement limited to action by a federal agency, there was no need to explicitly prohibit state actions from displacing the Secretary's authority to enforce the Act, as federal actions took priority under the Constitution's Supremacy Clause. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978); *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). *See generally Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369 (1986).

The initial proposal for exclusive enforcement by the Secretary was changed by an amendment providing that the Act be enforced through civil actions brought by aggrieved persons or the Secretary of Labor.[21] The congressional committees adopted the amendments and changed the enforcement machinery from primarily administrative hearings to an administrative process plus civil actions in court. At the same time, the committees

[20] S. 830, as introduced, 90th Cong., 1st Sess. 14, reprinted in 113 Cong. Rec. 2794-95 (1967) (Leg. Hist. 69).

[21] Proposed Amendments 123-129 to S. 830, reprinted in 113 Cong. Rec. 7076 (1967) (Leg. Hist. 71-73).

changed section 14 to section 14(a), added the supersede clause, and also added a new section 14(b).[22]

By eliminating the federal government as the exclusive enforcer of the ADEA, Congress removed the protective cloak of the Supremacy Clause. However, by adding the supersede clause, the same result was achieved. This legislative sequence raises the inference that at least one purpose in providing that ADEA civil actions supersede state action was to insure the same protection against state interference previously provided by the Supremacy Clause. *Cf. Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 725 n. 6 (1980). Thus, by explicitly providing that an ADEA action in federal court supersedes any state action, Congress indicated its intent that determinations by state agencies would have no preclusive effect in ADEA cases.

C. The Absence of a "Substantial Weight" Provision Does Not Compel Administrative Preclusion.

Nothing in this Court's decisions compels the conclusion that express statutory language, such as the "substantial weight" provision in Title VII,[23] is required for finding that administrative preclusion is inconsistent with the ADEA. To the contrary, the Court's decisions in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) and *Chandler v. Roudebush*, 425 U.S. 840 (1976), acknowledge the right to a *de novo* court proceeding even in the absence of an explicit statutory mandate. More-

[22] S. 830, § 14(a), S. Rep. No. 723, 90th Cong., 1st Sess. (Leg. Hist. 136); H.R. 13054, § 14(a), H.R. Rep. No. 805, 90th Cong., 1st Sess. (Leg. Hist. 103).

[23] The circuit courts finding that administrative preclusion is required in ADEA cases erroneously interpret *Elliott* as mandating explicit statutory language prohibiting preclusion or specifying the weight to be accorded state administrative determinations. *See Stillians v. Iowa*, 843 F.2d 276, 281 (8th Cir. 1988) ("We believe that the absence of a similar provision from the ADEA goes far toward resolving the issue before us."); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) (without analysis).

over, the Court's conclusions in *Kremer* and *Chandler* rest on analyses of Title VII provisions and legislative history that parallel the ADEA, which make them even more relevant to the Court's consideration of this case.

In *Kremer*, the Court recognized that prior to the addition of the "substantial weight" language in Title VII § 706(b), "EEOC was free to ignore state administrative decisions." *Id.* The *Kremer* holding implies that even absent a "substantial weight" provision, state agency determinations do not preclude federal action. *Kremer*, 456 U.S. at 474-75 n. 16.

Since the purpose of adding the "substantial weight" language to Title VII was to increase the deference accorded state findings, *Kremer*, 456 U.S. at 474-75 and n. 16, it would be anomalous to conclude that the absence of a "substantial weight" provision in the ADEA compels absolute deference to administrative determinations.[24] To the contrary, the language of sections 14(a) and (b) of the ADEA demonstrate Congress' intent that state proceedings would have no effect on an ADEA action.

Similarly, in *Chandler v. Roudebush*, 425 U.S. 840 (1976), the Court found a right to *de novo* federal court review despite the absence of express language in section 717 of Title VII mandating a *de novo* proceeding or a provision according "substantial weight" to the administrative determination. *Chandler* held that

> [t]he legislative history of the 1972 [Title VII] amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees. . . .

425 U.S. at 848.

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[24] *See Martinez v. United Automobile Aerospace & Agricultural Implement Workers of America*, 772 F.2d 348, 351 (7th Cir. 1985) ("The policy of deference to state authority . . . is weaker [in the ADEA] than in Title VII. . .").

The reasoning and result of *Chandler* apply to the ADEA, as this Court has held that the federal employee provisions of the ADEA, section 15, were modeled after Title VII section 717, *Lehman v. Nakshian*, 453 U.S. 156, 167 n. 15 (1980). Senator Bentsen, the sponsor of section 15 of the ADEA, emphasized that "[t]he measures used to protect federal employees from [age discrimination] would be substantially similar to those incorporated in recently enacted amendments to Title VII." 118 Cong. Rec. 24397 (1972)." *Lehman v. Nakshian*, 453 U.S. at 167 n. 15. Moreover, the legislative history of the ADEA federal employee provision makes clear that federal employees would be entitled to the same protections as private employees. S. Rep. No. 690, 93d Cong., 2d Sess. 56 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40-41 (1974). Given the parallelism between the ADEA and Title VII, *Chandler* also provides support for finding that administrative preclusion is inconsistent with the ADEA.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the Court affirm the judgment of the Second Circuit.

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IN THE

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OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

– against –

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK ON BEHALF OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK ON BEHALF OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The New York State Division of Human Rights, by its attorney, Robert Abrams, Attorney General of the State of New York, submits this brief *amicus curiae* pursuant to Supreme Court Rule 37.3 in support of respondent Angelo J. Solimino. *Amicus* urges this Court to affirm the judgment of the court below that the administrative determination of the New York State Division of Human Rights ("DHR"), which was never reviewed in any

judicial forum, should not be given preclusive effect in respondent's action in the district court under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*

Amicus DHR is authorized by state law, *inter alia*, to investigate and seek to redress age discrimination in employment. N.Y. Exec. (Human Rights) Law § 290 *et seq.* (McKinney 1982). It is an integral component of a state and federal scheme to investigate and resolve complaints of age discrimination in employment. DHR cooperates with the Equal Employment Opportunity Commission ("EEOC") under a formal worksharing agreement to provide comprehensive enforcement of age discrimination laws at the administrative level.

Effective enforcement of federal and state age discrimination laws requires that a grievant be able to pursue a federal district court action under the ADEA if his complaint is not satisfactorily resolved at the administrative level. If recourse to the federal court is denied to the grievant as a result of the preclusive effect of his state administrative action, DHR's effectiveness in conciliating and resolving complaints of age discrimination will be reduced. *See* pp. 13-16, *infra*. *Amicus* has a strong interest in ensuring grievants have complete access to state and federal remedies for violations of age discrimination laws.

SUMMARY OF ARGUMENT

This Court has held that unreviewed state administrative determinations are not entitled to preclusive effect in a district action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* In so doing, the Court examined the language and legislative history of Title VII and determined that federal common-law preclusion would be inconsistent with congressional intent. The court below followed this Court's analysis in correctly holding that Congress' intent in passing the ADEA was parallel to its intent in passing Title VII and that unreviewed state agency determinations should not have preclusive effect in a subsequent federal ADEA case.

Congress did not intend to force ADEA grievants to elect between the state administrative agency or federal court remedies.

Requiring an election of remedies would undermine congressional intent to create an interrelated state and federal enforcement scheme to redress age discrimination in employment. It would also cause the proliferation of unnecessary litigation, discourage voluntary settlements, and create from the mechanisms for securing protection against age discrimination a procedural obstacle course that only the sophisticated litigant could successfully complete. The result petitioner urges would produce the anomalous result of according grievants in states with anti-discrimination agencies less protection under the ADEA than grievants in states without anti-discrimination agencies.

The processes available to a grievant prior to a no probable cause determination by DHR are insufficient to rest his right to an action in federal court under ADEA. Congressional intent would be violated if preclusion is based on an unreviewed administrative determination of no probable cause by DHR.

ARGUMENT

POINT I

CONGRESS DID NOT INTEND TO GIVE UNREVIEWED STATE ADMINISTRATIVE FACT-FINDING PRECLUSIVE EFFECT IN CLAIMS BROUGHT IN DISTRICT COURTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

A. *The Language and History of the ADEA Evince A Congressional Intent Disfavoring Preclusion*

The Court of Appeals correctly rejected petitioner's contention that the administrative determination of the DHR, which was never reviewed in any judicial forum, should be given preclusive effect in respondents' action in the District Court under the ADEA, 29 U.S.C. § 621 *et seq.* *Solimino v. Astoria Federal*

Savings and Loan Assoc., 901 F.2d 1148 (2d Cir. 1990) ("*Solimino*").[1] Moreover, in reaching that result, the Court of Appeals properly framed the issue when it inquired whether Congress in enacting the ADEA intended to give preclusive effect to unreviewed state agency findings. Contrary to petitioner's assertion, Petitioner's Brief ("Pet. Br.") at 11-17, this Court has not created a presumption in favor of giving preclusive effect to unreviewed determinations by state administrative agencies in subsequent actions brought in federal courts under federal statutes. Rather, it has considered case-by-case whether fashioning a common-law rule of preclusion is consistent with Congress' intent when it enacted the federal law.

The Court displayed that mode of analysis in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) ("*Elliott*"). That case raised the question whether unreviewed state administrative factfinding should be given preclusive effect in a federal court action alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Although no federal law required preclusion, the court recognized that it had "frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." 478 U.S. at 794. It framed the issue before it as "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII [and 42 U.S.C. § 1983]."

In determining that Congress did not intend that state administrative factfinding have preclusive effect in a federal action under Title VII, the Court looked first to the language of the statute. Observing that Title VII requires the EEOC in investigating employment discrimination charges to give "substantial weight" to state administrative decisions, 42 U.S.C. § 2000e-5(b), it reasoned that such a provision would be

[1] Second Circuit's decision is in accordance with the Seventh Circuit's decision in *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987), and directly in conflict with the Eighth Circuit's holding in *Stillians v. Iowa*, 843 F.2d 276 (8th Cir. 1988). The other two circuit courts to decide the issue of preclusion did so without discussing congressional intent but held that the administrative proceedings did not afford the grievants an adequate opportunity to litigate their claims. *Delgado v. Lockheed-Georgia, Inc.*, 815 F.2d 641, 646 (11th Cir. 1987); *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1283 (9th Cir. 1986).

unnecessary if state administrative decisions were entitled to preclusive effect. 478 U.S. at 796. That conclusion was consistent with, and indeed, foreshadowed by, *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). There the Court held that a state court affirmance of an administrative determination dismissing a complaint of racial discrimination in employment is entitled to preclusive effect under 28 U.S.C. § 1738 in a Title VII action. At the same time, it noted that the "substantial weight" review the EEOC must give to state agencies' determination would be pointless if the federal courts were bound by the state agency determination. 456 U.S. at 470, n.7. ("[I]t is clear that unreviewed administrative determinations by state agencies also should not preclude [federal] court review even if such a decision were to be afforded preclusive effect in a States' own courts.") The *Elliott* Court also looked to the decision in *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976), which discerned in the language and legislative history of Title VII Congress' intent to accord individuals a right to a trial *de novo* following administrative proceedings. It found that it "would be contrary to the rationale of *Chandler* to apply res judicata to deny respondent a trial *de novo* on his Title VII claims". *Elliott*, 478 U.S. at 796.

To determine whether state administrative factfinding would result in preclusion of a subsequent federal action under 42 U.S.C. § 1983, the *Elliott* Court similarly reviewed the language and history of § 1983 to discover Congress' intent. It noted that its decisions in *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), held that the Reconstruction Congress in enacting the 1871 Act did not intend to contravene the preclusive effect of a state court judgment or repeal the express statutory requirements of the predecessor to 28 U.S.C. § 1738. *Elliott*, 478 U.S. at 796. Because it found no congressional intent in the legislative history or the language of the statute to foreclose the adaptation of traditional principles of preclusion to administrative adjudication, it held that administrative preclusion applied in § 1983 suits when the administrative body "act[ed] in a judicial capacity and resolve[d] disputed issues of fact properly before it which the parties []

had an adequate opportunity to litigate." *Id.* at 797-98 (citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966)).

The Second Circuit, applying the *Elliott* mode of analysis in *Solimino*, reviewed the legislative history, language, and purposes of the ADEA and correctly ruled that Congress did not intend unreviewed state agency determinations to have preclusive effect in a subsequent case under the ADEA. Petitioner's entire argument that the Court of Appeals erred rests on the erroneous premise that this Court has created a presumption in favor of giving preclusive effect to administrative factfinding and that Congress has not expressly evinced its intent to act in derogation of the common-law presumption. However, if there were a presumption generally favoring preclusion, Congress adequately evinced its intent in both the language and history of the ADEA that preclusion not apply in actions brought under that statute.

Section 14(b) of the ADEA, 29 U.S.C. § 633(b), provides that, when alleged age discrimination occurs in a state which has an age discrimination law, the grievant may not sue under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." The natural reading of the deferral provision is that if the state proceedings terminate before the sixty day period ends for any reason — including an administrative determination adverse to the plaintiff — then suit may be brought in district court. As the Second Circuit observed, "Congress would not have allowed plaintiffs to bring suit under the ADEA following termination of state administrative proceedings if it had intended a judicially unreviewed fact-finding in such proceedings to have preclusive effect in the federal suit." *Solimino*, 901 F.2d at 1150-51.

Petitioner has no direct response to that observation. Rather, it suggests, *see* Pet. Br. at 20-22, that the termination that must occur before the sixty day period ends to allow the filing of suit must be one where the state agency abandons its investigation or conciliation efforts, or the grievant refuses to participate in

them. While it concedes that "[i]f the state process were abandoned for any reason, then a federal court action under the ADEA could proceed," *id.* at 21, a reason for the termination does not, in petitioners reading, include an adverse agency determination, though nothing in the statute itself suggests that result. In short, petitioner would convert § 14(b) into an involuntary election of remedies provision under which those grievants and only those grievants who are dissatisfied with the state agency's decision arrived at before the end of the sixty day period are precluded from bringing suit in federal court.

That result is plainly absurd since it suggests that Congress intended to accord grievants who are recalcitrant or dilatory or fortunate to have filed before an inattentive state agency broader access to the federal courts than those who participate in the state agency's investigation or conciliation efforts. It would lead as well to the further absurd conclusion that Congress intended the EEOC's investigatory powers to be useless. Under the ADEA, the EEOC and state agencies have concurrent jurisdiction to investigate allegations of age discrimination. 29 U.S.C. §§ 626(d), 633(b). If Congress had intended preclusion for judicially unreviewed state agency findings, "the concurrent or subsequent EEOC investigation would be superfluous." *Duggan v. Board of Education*, 818 F.2d at 1295; *Solimino*, 901 F.2d at 1151. Congress could not have intended that the EEOC become a vestigial organ of the government.

Indeed, the result pressed by petitioner would conflict with Congress' purposes when it provided for the sixty day waiting period. Congress enacted the sixty day deferral mechanism "to give state agencies a limited opportunity to resolve problems of employment discrimination" and thereby to make unnecessary resort to federal relief by victims of the discrimination and "to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1976). Those purposes will be poorly served by a rule of

administrative preclusion that encourages a grievant's delay or non-cooperation during the very period when the state has its limited opportunity to pursue a satisfactory resolution and thereby screen from the federal courts grievances not in need of litigation. Indeed, precisely to guard against that result, Congress provided in section 14(a) of the ADEA, 29 U.S.C.§ 633(a), that the commencement of an ADEA action "shall supersede any state action." "There would be little reason to give a grievant a second bite at the apple if prior judicially unreviewed fact-finding, adverse to the grievant, were intended to bar a federal court from an independent determination of the matter." *Solimino*, 901 F.2d at 1151.

The common legislative history of the ADEA and Title VII lends further support to the conclusion that Congress did not intend to give preclusive effect to judicially unreviewed fact-finding of a state deferral agency. Even before the passage of the ADEA, there were congressional attempts to outlaw age discrimination. Some members of Congress expressed interest in including a provision making age a protected category under the Civil Rights Act of 1964, but because others did not then appreciate the magnitude of the problem of age discrimination in employment, it was not added so as not to jeopardize the chance of the bill's passage. Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 Minn. L. Rev. 1038, 1053 & n. 64 (1984) [hereinafter referred to as Note, *Disparate Impact Analysis*]. As a compromise, the Civil Rights Act was passed with a provision directing the Secretary of Labor to study the problem of age discrimination in employment. 113 Cong. Rec. 31,254 (1967). Although the Secretary of Labor explored nonstatutory means of curbing age discrimination in the workplace he rejected that possibility as "barren." Rather, following his study, he recommended a federal statutory scheme to "promote hiring without discrimination on the basis of age." When Congress enacted the ADEA, it "clearly intended to extend title VII protection against discrimination to cover age." Note, *Disparate Impact Analysis* at 1054. *See also* 113 Cong. Rec. at 31,255 (1967) (statement of Sen. Javits) (the two Acts were complementary in that ADEA did not cover race or religion and the Civil Rights Act did not cover age).

The parallels between the ADEA and Title VII continue from their common legislative histories to the substantive and many of the procedural provisions of the statutory language. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988); *Oscar Mayer v. Evans*, 441 U.S. 750, 755 (1979); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). On more than one occasion, this Court has explored the meaning of one statute as a means of construing the provisions of the other because the two statutes use comparable language. That has been especially true with respect to the deferral provisions of the two statutes. *E.g.*, *Oscar Mayer*, 441 U.S. at 775-76; *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 122. "[S]ince the language of § 14(b) [of ADEA] is almost *in haec verba* with § 706(c) under Title VII . . . it may be properly concluded that Congress intended that the construction of [§ 14(b)] should follow that of § 706(c)." *Oscar Mayer*, 441 U.S. at 756; *EEOC v. Commercial Office Products*, 486 U.S. at 123-24.

It was long ago settled that the common-law doctrine of administrative preclusion will not operate to deprive a Title VII plaintiff of his opportunity to establish his claim in federal court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974) (recognizing a private employee's right to trial *de novo* under Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (same). The Court has since had several occasions to revisit the issue in varying factual settings, and each time has concluded that unreviewed administrative factfinding, whether state or federal, has no preclusive effect in a federal court Title VII action. *Elliott*, 478 U.S. at 795-96; *Chandler v. Roudebush*, 425 U.S. at 848 ("Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private sector employees and employees of state government and political subdivisions"). *Cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. at 470 n.7. Given the legislative histories, purposes and language common to the ADEA and Title VII, the Court of Appeals was correct to conclude that preclusive effect should be given to unreviewed state agency findings no more in an ADEA action than in one under Title VII. As the

Seventh Circuit put it, it is "unlikely that Congress intended the process to stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." *Duggan v. Board of Education*, 818 F.2d at 1295.

Although the two deferral statutes are "virtually *in haec verba*," to the extent that there are differences between the two statutes' deferral provisions, those differences suggest that administrative preclusion is less appropriate in ADEA suits than in those brought under Title VII. Under Title VII, a claimant must wait 60 days after commencement of state agency proceedings before filing a charge with the EEOC. 42 U.S.C. § 2000e-5(c). During that period the state agency has exclusive jurisdiction over the complaint. *Id.* After that deferral, the grievant must wait another 180 days before filing in federal court, 42 U.S.C. § 2000e-5(f)(1), and may file the action only upon receipt from the EEOC of a notice evidencing his right to do so. 42 U.S.C. § 2000e-5(b) and (f). In contrast, an ADEA claimant may file in the state agency and the EEOC simultaneously during which period the agencies have concurrent jurisdiction. *Oscar Mayer*, 441 U.S. at 757. After 60 days, and without any further administrative action, he may file in federal court. 29 U.S.C. § 633(b). Furthermore, while under the ADEA state agency proceedings are automatically stayed upon the filing in federal court, 29 U.S.C. § 633(a), the district court has discretion under Title VII to stay federal proceedings pending the termination of state proceedings. 42 U.S.C. § 2000e-5(f)(1). These distinctions demonstrate that Congress intended to accord less deference to state administrative proceedings under the ADEA than under Title VII. Clearly, if deference in the form of administrative preclusion is not required by Title VII, it should apply to ADEA claims.

Petitioner and the district court below rest their conclusion that preclusion is proper here on *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988) ("Stillians"), which failed to make a complete inquiry into the congressional intent underlying the ADEA. In fact, *Stillians* proceeds from the erroneous premise that this Court has created a presumption favoring administrative

preclusion. And though this Court has frequently looked to the deferral mechanisms of Title VII to interpret the analogous ADEA provision, the *Stillians* court rejected that approach while citing no authority for its position. *Id.* at 281. Its perfunctory and mechanistic application of *Elliott* in the ADEA context therefore resulted in an unsound conclusion. It focused solely on the absence from the ADEA of language as exists in Title VII requiring the EEOC to accord "substantial weight" to state agency findings to conclude that Congress had not expressed its intent to override the presumption favoring preclusion. In fact, *Stillians* was wide of the mark with respect to the "substantial weight" language. The requirement that the EEOC accord substantial weight to state administrative findings was added by the 1972 amendments to Title VII because the EEOC had previously accorded those findings no deference. *Kremer*, 456 U.S. at 470 n.8. Notwithstanding that amendment, this Court has held that the direction to the EEOC to respect state agency factfinding does not require the conclusion that Congress intended to give that factfindings preclusive effect in federal court Title VII actions. *Elliott*, 486 U.S. at 795. The Eighth Circuit plainly erred when it concluded that the absence from the ADEA of the "substantial weight" direction evidences Congress' failure to eschew preclusion. Rather, that hiatus compels the opposite conclusion, as both *Solimino*, 902 F.2d at 1153-54 and n.8, and *Duggan*, 818 F.2d at 1297, properly recognize.

The fact that the legislative history of the ADEA may not expressly treat the issue of preclusion does not avail petitioner. Congress was frequently silent on issues that might arise under the ADEA that had been debated when it passed Title VII. For example, although the legislative history of the 1972 Title VII amendments demonstrate Congress' intent to provide federal employees with a trial *de novo* following administrative factfinding, the ADEA legislative history is silent on the matter. Nevertheless, both the Fourth and Ninth Circuits have held that federal employees are entitled to trial *de novo* in ADEA federal actions, noting that, in amending the ADEA, Congress found it unnecessary to reconsider issues previously resolved in the Title VII amendment debates. *Rosenfeld v. Department of Army*, 769 F.2d 237, 240 (4th Cir. 1985); *Nabors v. United States*, 568 F.2d

657, 660 (9th Cir. 1978) ("The similarity of the two Acts in form and substance strongly suggests that Congress, in 1974, felt it unnecessary to discuss and debate the old issues all over again and intended that the two Acts should have the same effect . . .")

Finally, rejecting the application of administrative preclusion is consistent with Congress' policy of affording free access to the federal courts to ADEA plaintiffs. When enacting the ADEA, Congress considered enforcing the statute either under the Fair Labor Standards Act through the Wage and Hour Division of the Department of Labor, which would encompass an ultimate resolution of claims in a judicial forum, or through the National Labor Relations Act, which would provide for resolution of claims through administrative proceedings. *Nicholson v. CPC Intern. Inc.*, 877 F.2d 221, 226 (3rd Cir. 1989). When Congress opted for the FLSA enforcement scheme "[it] made a deliberate policy choice in favor of enforcement of ADEA claims in court proceedings." *Id.* Moreover, as the Second Circuit accurately noted, the "ADEA contains numerous provisions indicating a congressional intent to allow ADEA grievants earlier and freer access to federal courts than Congress allowed Title VII grievants." *Solimino*, 901 F.2d at 1152 and n.4. Those provisions include a shorter deferral period under the ADEA than under Title VII, as well as the availability of liquidated damages that are punitive in nature, and the opportunity for a jury trial not present under Title VII. There is simply no reason to suppose that Congress made a single exception sanctioning the application of common-law preclusion to make the remedies available under the ADEA more narrow than under Title VII when in most other respects the ADEA is more generous to grievants than is Title VII.

B. *A Holding That Unreviewed State Agency Fact-finding Is Entitled To Preclusive Effect Would Undermine Congressional Intent To Create An Interrelated State And Federal Enforcement Scheme To Redress Age Discrimination.*

In passing the ADEA, Congress did not intend that claimants must decide if they will proceed to vindicate age discrimination

rights under either state or federal law. Congress intended that claimants have an opportunity to avail themselves of both laws with a parallel course of relief. If the claimant desires, he can stay state proceedings by filing in federal court; but he is not *required* to do so in order to avoid preclusion. Indeed, Congress intended the deferral provision to screen from the federal courts those problems of civil rights that could be settled *to the satisfaction of the grievant* in "a voluntary and localized manner." *Oscar Mayer*, 441 US at 2071 (citations omitted) (emphasis added).

The consequences of any contrary conclusion are implicit, if not amply described, in petitioner's brief. Petitioner argues that Solimino should have "opted out" of the state proceedings, Pet. Br. at 25, and elected the federal judicial remedy in order to avoid preclusion of his federal claim. That construction of §14(b) would severely undermine cooperation between federal and state authorities; cause the proliferation of unnecessary litigation; discourage voluntary settlement; and create from the mechanisms for securing protection against age discrimination an obstacle course of procedural pitfalls that only the sophisticated litigant will successfully complete.

Petitioner's argument that a complainant can merely opt out of state agency proceedings and thereby avoid preclusion proceeds from the uncertain premise that state laws permit an opting out. In New York, however, once a complaint is filed with the state agency, the complainant has no control over the investigation except that he may withdraw the complaint and forego any further rights under the New York Human Rights Law. N.Y. Exec. Law § 297(9) (McKinney 1982)[2]; N.Y. Admin. Code tit. 9, §465.5 (1985). While it is true that the ADEA has no state administrative exhaustion requirement, *Oscar Mayer*, 441 U.S. at 761, it is not at all clear that an ADEA plaintiff can

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[2] The New York Human Rights Law contains an election of remedies which is triggered by filing a complaint with DHR. N.Y. Exec. Law § 297(9). If a complainant withdraws his complaint from DHR, he is precluded from bringing his state law claim in state court.

withdraw the state agency complaint before the sixty day deferral period has run, and still comply with the requirements of § 14(b). Indeed, had Solimino done so, petitioner undoubtedly would have challenged his ADEA complaint on jurisdictional grounds.

Short of a complete withdrawal, a complainant can ensure that DHR makes no determination during the first sixty days only by obtaining a dismissal for administrative convenience. However, such a dismissal may be granted only at the discretion of DHR, which may not exercise its discretion in a manner that will "contravene or threaten to contravene a statute, constitutional right or administrative regulation." *Marine Midland Bank v. Human Rights*, 75 N.Y.2d 240, 246, 551 N.E.2d 558, 560, 552 N.Y.S.2d 65, 67 (1989); *Pan Am v. Human Rights Bd.*, 61 N.Y.2d 542, 547, 463 N.E.2d 597, 599, 425 N.Y.S.2d 256, 258 (1984).

Thus, it is not at all clear that, for at least the first sixty days that an age complaint pends before DHR, there is any formal mechanism for avoiding a determination by the state agency. Petitioner is, of course, correct that a complainant can refuse to cooperate with the state agency. To the extent he does so, the chances that the agency will render a no probable cause determination will increase, and, so concomitantly will the likelihood that the grievant will be barred from a federal remedy. In that event, if it is true that preclusion results from unreviewed no probable cause findings, it will be no answer that the complainant opted out for "[t]he fact that [a complainant] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer v. Chemical Construction Corp.*, 456 U.S. at 435; *cf. Juidice v. Vail*, 430 U.S. , 337 (1977) (party's failure to take opportunity to present federal claims in state court does not show state's procedures are inadequate).

Even if it were certain that administrative preclusion could be avoided by a complainant's non-cooperation or the state agency's non-action, that is hardly the result Congress intended when

it enacted the ADEA. Petitioners' proposal to require complainants to opt out of the state proceedings would reduce § 14(b) of ADEA to a game in which only those complainants fortunate to have skilled private counsel will be able to play. Sophisticated DHR complainants may attempt to circumvent a DHR determination first by deliberate delay and then by filing an action in federal court upon the sixty-first day following the DHR filing as required by § 14(b). *See Stillians*, 843 F.2d at 283 (Lay, J. dissenting). That would deprive DHR of the opportunity to investigate, conciliate and resolve complaints which arise in the State of New York. That in turn would cause a proliferation of actions in district courts that can and should be resolved through state intervention. At the same time, some number of dissatisfied complainants' who receive a no probable cause determination will be constrained to seek review in the state courts in order to protect their federal rights. The twin objectives of §14(b) of promoting localized conciliation and avoiding unnecessary litigation will both be undermined by the result petitioner urges upon this Court. The cooperative relationship between the EEOC and DHR would also be impaired by preclusion. Claimants who file with the EEOC will request the EEOC to direct DHR not to act on the complaint when EEOC refers the complaint to DHR pursuant to its worksharing agreement.[3] Although such a request may be consistent with § 14(b), DHR will lose its opportunity to resolve the complaint. As a consequence, EEOC, an agency already overburdened with complaints, will likely be faced with an increased number of filings.[4]

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[3] Under the current worksharing agreement between the EEOC and DHR, DHR designated the EEOC as its agent to accept charges of age discrimination under N.Y. Exec. Law § 296, and the EEOC refers to DHR copies of all charges it receives. Although the EEOC "refers" all charges to DHR, it "defers" or transmits only "certain charges" for actual processing by DHR. Age Discrimination in Employment Act, Worksharing Agreement between the United States Equal Employment Opportunity Commission and the New York State Division of Human Rights, October 1, 1990 to September 30, 1991.

[4] See Note, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees?* 35 Villanova L. Rev. 389, 425 n.184 (1990) which describes the legislative history of the EEOC'S backlog:

(Footnote continued)

Indeed, preclusion may cause the EEOC to terminate its worksharing agreements with deferral agencies for age discrimination cases. The worksharing agreement is the basis for a cooperative relationship between the EEOC and state anti-discrimination agencies in "deferral" states. These agencies benefit from EEOC's continuing cooperation in providing enforcement, technical assistance, research and public information activities, such as national conferences at which states can share information. *See* 29 C.F.R §1626.10. Additionally, EEOC provides monetary reimbursements for the ADEA complaints processed by the agencies. This cooperative scheme of anti-discrimination enforcement may cease if preclusion results from an unreviewed state agency determination. Already the EEOC has threatened to change the terms of the worksharing agreements or even to terminate them as not in the interest of its complainants. *See* EEOC Brief submitted in support of petition for a writ of certiorari, at 10.

DHR has processed an average of 1,394 age discrimination cases annually from 1985 to 1990. DHR Annual Reports, March 31, 1985 to March 31, 1990. Without DHR to screen cases administratively more cases will be filed and federal litigation may be increased. *See Stillians*, 843 F.2d at 283 (Lay J. dissenting). That will put an additional strain on "federal courts [already]

See generally The EEOC's Performance in Enforcing the Age Discrimination in Employment Act: Hearing Before the Senate Special Comm. on Aging, 100th Cong., 2d Sess. 2 (1988) (since 1984, EEOC delay has caused upwards of 7,500 ADEA charges to exceed statute of limitations for filing suit); *EEOC Delays in Processing Age Discrimination Charges: Hearing Before Subcomm. of the House of Comm. on Gov't Operations*, 100th Cong., 2d Sess. 44 (1988) (total number of lawsuits filed by EEOC has increased by 100% from 1982-1987 while congressional appropriations have decreased); *see also Age Discrimination Claims Assistance Act of 1988*, P.L. 100-283, 102 Stat. 78 (1988) (allowing for parties to bring civil action when EEOC delay causes running of statute of limitations).

drowning in litigation." *Norris v. United States*, 687 F.2d 899, 903 (7th Cir. 1982).[5]

A rule giving preclusive effect to unreviewed fact-finding of state administrative agencies will lead to inconsistent applications of the ADEA. Since EEOC review does not preclude *de novo* review in federal court, a holding that preclusion obtains would produce inequitable results. A complainant's access to federal court would depend upon the wholly fortuitous circumstance of whether his state has a discrimination agency empowered to resolve age disputes. In deferral states, the agency's decision would have preclusive effect, while, in the remaining states, the EEOC's determination would not preclude litigation. The Court in *Mohasco Corp. v. Silver*, 447 U.S. 807, 821 (1980), observed that the legislative history for the Title VII deferral provision, 42 U.S.C § 2000e-5, discloses only one reason for treating workers in deferral states differently from workers in other states: "to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated." Similarly, the statutory plan for the ADEA was not designed to force the grievants to choose between state administrative or federal court remedies.

A holding that administrative fact finding never subjected to judicial review is entitled to preclusive effect, will construct a rule that sets a trap for every unwary *pro se* or poorly represented

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[5] Age discrimination complaints are likely to increase due to the current economic recession. Note, *Age Discrimination in Employment: Available Federal Relief*, 11 Colum. J.L. & Soc. Probs. 281, 282 (1975) (A Wage and Hour Administrator noted that "with the economy constricting, employers will have more of a choice of workers and may be tempted not to hire older workers, or to lay off higher paid workers who happen to be older workers") (citing from 87 BNA Lab. Rel. Rep. 250 (1974)); *Nicholson*, 877 F.2d at 230 ("the Secretary of Labor's . . . .report repeatedly emphasized federal age discrimination . . . constitute[d] a serious problem for older workers earning higher salaries and benefits, both because employers can reap the greatest financial benefits for replacing [them] with younger, lower paid ones, and because these employees will have difficulty getting a comparable position if discharged" (citations omitted).

complainant. Congress could not have intended such a result in enacting a remedial statute in which "laymen, unassisted by trained lawyers, [would] initiate the process" of filing an enforcement action. *Oscar Mayer*, 441 U.S. at 761. Indeed, such a result cannot be squared with the congressional intent that the fight against discrimination be a policy "of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)).

POINT II

ASSUMING, ARGUENDO, THAT IN ENACTING THE ADEA CONGRESS DID NOT INTEND TO FORECLOSE GIVING PRECLUSIVE EFFECT TO UNREVIEWED STATE AGENCY FACTFINDING, DHR'S NO PROBABLE CAUSE DETERMINATIONS SHOULD NOT PRECLUDE SUIT IN THE DISTRICT COURT

DHR's mandate is "to assure that every individual within [New York] is afforded an equal opportunity to enjoy a full and productive life. . ." N.Y. Exec. Law § 290 (McKinney 1982). It does so by reviewing and conciliating claims of discrimination, and upon a finding of probable cause to believe discrimination has occurred, by bringing an action to a hearing. In so doing, DHR screens from federal court those ADEA actions that can be satisfactorily resolved at the state agency level.

Once a complaint is filed, a human rights specialist investigates, may hold a fact-finding conference at which all parties may be present and, ultimately makes a recommendation of a finding of either probable cause or no probable cause to the regional director, who makes the ultimate determination.[6]

[6] This conference, although referred to as a "hearing" by Petitioner in its brief at 4, should not be confused with a full hearing held after a finding of probable cause. Solimino's conference was unusual; most conferences are not transcribed and although apparently permitted in his conference, cross-examination by attorneys is in violation of DHR policy. At the investigation stage, attorneys are only to act in an advisory capacity. DHR Policy and Procedure Manual § 407.3.

If there is a finding of probable cause, a hearing is held to determine whether respondent engaged in discriminatory behavior. N.Y. Exec. Law § 297(4)(a) (McKinney Supp. 1991). If there is a finding of no probable cause, the complaint is dismissed. N.Y. Exec. Law § 297(2) (McKinney 1982). At any time after the filing of a complaint, DHR may attempt to conciliate to resolve the complaint.[7] N.Y. Exec. Law § 297(3)(a) (McKinney 1982). The agency does not assign a lawyer to the case unless and until a determination of probable cause is made and a hearing is scheduled.[8] However, if no probable cause is found, the complaint is dismissed, and the complainant usually has not had the benefit of legal counsel at any point in the administrative proceeding.[9] *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 68-69.

[7] The Petitioner argues that a claimant should "insist that . . . the state authority proceeding be limited to exploring the possibility of conciliation or settlement" rather than "choose" to participate in factfinding. Pet. Br. at 23-24. Petitioner's proposition is nonsensical. Conciliation and settlement cannot be fairly conducted unless the evidence is properly developed through careful factfinding in order to make an assessment of what is a fair and reasonable settlement.

[8] Even when a DHR attorney appears for the hearing, she does not represent the interests of the complainant, but rather those of the state. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 (1980).

[9] Although Respondent was represented by private counsel prior to the no probable cause determination, an overwhelming majority of complainants are not. In contrast, most respondent employers are represented by counsel. Without private counsel, the complainant is at a definite disadvantage. For example, if a complainant has private counsel, the counsel can request that DHR issue investigatory subpoenas. However, if the complainant is not represented by counsel, she must make a showing of necessity before a subpoena duces tecum will be issued. N.Y. Admin. Code tit. 9, § 465.12(c)(1977).

Further, even though the human rights specialist is assigned the complaint for investigative purposes, he is representing the interests of the state. He cannot advise the complainant whether to accept a settlement. Moreover, he is empowered to execute a settlement agreement with the employer over the complainant's objections. *N.Y. Gaslight Club*, 447 U.S. at 69-70; N.Y. Exec. Law § 297(3)(c) (McKinney 1982).

Once the complainant receives a dismissal for no probable cause, she may appeal DHR's decision by commencing an action in state court where findings of fact by DHR are subject to an "arbitrary and capricious" standard of review. *Giles v. DHR*, ____A.D.2d____, 563 N.Y.S.2d 142 (1990); *Mayo v. Hopeman Lumber & Manuf. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694 (1970).[10]

The reservations expressed by this Court in *Alexander v. Denver-Gardner* about the appropriateness of allowing arbitration procedures finally to resolve rights under Title VII are applicable here: "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." 415 U.S. at 57. Moreover, "[t]his observation is as true of ADEA as it is of Title VII." *Lorillard*, 434 U.S. at 584. Arbitration proceedings do not lead to preclusion because the factfinding process in arbitration is not equivalent to judicial factfinding: the record is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials are often severely limited or unavailable. *Alexander*, 415 U.S. at 57-58.

A DHR administrative investigation prior to a no probable cause determination is even less equivalent to judicial factfinding than an arbitration proceeding. As noted above, *supra* at 24,

[10] Respondent's no probable cause determination was given by an intermediate administrative review by the Human Rights Appeal Board. The Board was abolished in 1984 for budgetary reasons and a proceeding for judicial review in New York State Supreme Court, Appellate Division was established. 1984 N.Y. Laws, ch. 83, § 2. Because of DHR's concern that this change would cause a hardship for those without the financial resources to institute a proceeding in the Appellate Division, it instituted a No Probable Cause Review Unit to take the place of the Human Rights Appeal Board. Inter-Office Memorandum dated September 14, 1984, from Roberto Albertorio, General Counsel of DHR. However, the No Probable Cause Review Unit was abolished on December 1, 1984, for lack of resources. Inter-Office Memorandum, dated December 14, 1984, from Deputy Commissioner Abzug. In 1984, this process was again amended so that an appeal would be filed in the New York State trial-level Supreme Court. N.Y. Exec. Law § 298 (McKinney Supp. 1991); 1984 N.Y. Laws, ch. 83, § 3.

the complainant receives no assistance from a DHR attorney in presenting or developing his case. Employers by contrast are usually represented by counsel. Even if the complainant is one of the small minority who have private counsel at the investigation stage, attorneys are limited to acting in an advisory capacity, and may not cross-examine witnesses. *See supra* at 18 n.6. Furthermore, the human rights specialist does not act as an advocate, but rather represents DHR's interests, which, at times, "may be detrimental to the interests of the complainant and to enforcement of federal rights." *N.Y. Gaslight Club*, 447 U.S. at 70. As in arbitration under a collective bargaining agreement where "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," *Alexander v. Gardner-Denver*, 415 U.S. at 58 n.19, so may the complainant's interests be subordinated to that of the State. As this Court held in *Elliott* that a determination by an administrative assistant not be relied upon to secure the full guarantees of Title VII, it should also hold that neither should a determination made by non-lawyers, a state human rights specialist, and an agency regional director, be given authority to ensure that the guarantees of ADEA are fully enforced.

Finally, state anti-discrimination agencies hamstrung by inadequate budgets may give a discrimination charge less than the close examination it is due and would receive in federal court. Indeed, many no probable cause determinations are reversed for mistakes inherent in a system that is overwhelmed with complaints.[11] DHR, like many state anti-discrimination agencies, has in recent years been subject to severe budget restraints

[11] *See Bentkowsky v. Tokio Re Corp.*, 139 A.D.2d 436, 527 N.Y.S.2d 25 (1988) ("in view of the sparseness of the record . . . the matter should be remanded for a public hearing"); *In re Stephen Gregory v. NYS Human Rights Appeal Board*, 64 A.D.2d 775, 776, 407 N.Y.S.2d 256, 258 (1978) ("[N]o conference with all principals present was ever held. Neither was [complainant] given an opportunity to rebut the respondents' answers to his complaint. More important, the investigator failed to investigate the most important of petitioner's factual allegations.")

and a consequent reduction in staffing of the agency, resulting in an enormous backlog of cases.[12]

To hold that the processes available to a DHR complainant prior to a no probable cause determination are sufficient to preclude an action in federal court under the ADEA conflicts with congressional intent. In legislating a deferral provision to give states an opportunity at resolution, Congress intended to give *more* process to the complainant, not less.

[12] *See State Agricultural and Technical College* v. *DHR*, 134 A.D.2d 339, 520 N.Y.S.2d 814 (1987) (delay of nine years for final determination attributed to DHR); *Eastern Airlines* v. *State Human Rights Appeal Board*, 66 A.D.2d 581, 413 N.Y.S.2d 925 (1979) (complainant requested dismissal for administrative convenience from DHR because of her understanding of DHR's backlog of several thousand cases). The number of DHR cases awaiting determinations of probable cause or no probable cause have grown from 9,774 in 1985 to 12,651 in 1991. DHR Annual Reports of March 3, 1985 and February 28, 1991.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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